

**FILED IN THE DISTRICT COURT**  
**IN THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA COUNTY, OKLA.**  
**STATE OF OKLAHOMA**

MAY 14 2009

PATRICIA PRESLEY, COURT CLERK  
 by \_\_\_\_\_  
 DEPUTY

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., )  
 )  
 Intervenor. )

Case No. CJ-2006-3311

**PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY**  
**JUDGMENT**

Plaintiff, Oklahoma Department of Securities, *ex rel.* Irving L. Faught, Administrator, hereby responds to the motion for partial summary judgment filed by Defendants Farmers & Merchants Bank, Farmers & Merchants Bancshares, Inc., John V. Anderson, and John Tom Anderson (collectively, the "Defendants"). For purposes of brevity, Plaintiff incorporates herein by reference the material facts and legal arguments set forth in its summary judgment motion filed on May 8, 2009, as well as the evidentiary materials attached thereto (collectively, "Plaintiff's Motion"). Plaintiff's Motion is attached hereto as Exhibit 1.

In their motion, Defendants present an incomplete statement of the material facts of this case and a narrow interpretation of Section 408(b) of the Oklahoma Securities Act (Predecessor Act), Okla. Stat. tit. 71, §§ 1-413, 501, 701-703 (1991 & Supp. 2003), and Section 1-509(G)(5) of the Oklahoma Uniform Securities Act of 2004 (Act), Okla. Stat. tit. 71, §§ 1-101 through 1-

701 (Supp. 2003). Based on the information set forth below, Plaintiff requests that Defendant's motion for summary judgment be denied.

**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED  
BASED ON INCOMPLETE MATERIAL FACTS**

In addition to its assertion of the incomplete enumeration of all material facts, Plaintiff responds to Defendants' "Statement of Undisputed Material Facts" (Defendants' Facts) as follows:

The Department does not dispute ¶ 1 of Defendants' Facts, but notes that the Defendants have failed to reference the additional remedies sought by the Department, to include a permanent injunction and civil penalties.

The Department does not dispute ¶ 2 of Defendants' Facts.

The Department does not dispute ¶ 3 of Defendants' Facts, as it mischaracterizes and detracts from the real issues of this case as will be more fully addressed by Plaintiff below.

The Department disputes ¶ 4 of Defendants' Facts, as it mischaracterizes and detracts from the real issues of this case as will be more fully addressed by Plaintiff below. Lenard Briscoe (Briscoe) testified he would not have invested with Marsha Schubert (Schubert) if he had known she was committing a securities fraud. Transcr. Depo. Lenard Briscoe, Ex. 2, p. 39, lines 1-2. In addition, as a former director of a bank, Briscoe testified he would have not allowed a bank customer to operate on uncollected funds in a six figure amount for as short of a period as three months Transcr. Depo. Lenard Briscoe, Ex. 2, p. 40, lines 13-23, and, if a customer was operating a check kite, he would have stopped it as soon as he could. Transcr. Depo. Lenard Briscoe, Ex. 2, p. 41, lines 3-6.

The Department disputes ¶ 5 of Defendants' Facts, as it mischaracterizes and detracts from the real issues of this case as will be more fully addressed by Plaintiff below. Stephen

Pollard testified he would not have invested with Schubert if he had known she was committing a securities fraud and/or operating a Ponzi scheme. Transcr. Depo. Stephen Pollard, Ex. 3, p. 35, lines 21-24; p. 36, lines 4-6. Loren Pollard testified he would not have invested with Schubert if he had known she was committing a securities fraud and/or operating a Ponzi scheme. Transcr. Depo. Loren Pollard, Ex. 4, p. 11, lines 19-20; p. 12 lines 1-3.

The Department disputes ¶ 6 of Defendants' Facts as it mischaracterizes and detracts from the real issues of this case as will be more fully addressed by Plaintiff below. Bob Mathews, former trustee of the William R. Mathews Trust, testified that he would not have invested with Schubert if he had known she was committing a securities fraud. Transcr. Depo. Bob Mathews, Ex. 5, p. 76, lines 21-24.

The Department disputes ¶ 7 of Defendants' Facts as Defendants knew, or should have known, of the existence of the facts relating to the two checks of Lenard Briscoe, the checks of L&S Pollard Farms, LLC, and the checks of the William R. Mathews Trust – all such exceeded the \$2,500 limit and were, or should have been, reviewed by the F&M Loan Committee. *Admitted by Defendants in Answer.*

The Department disputes ¶ 8 of Defendants' Facts. Marsha Schubert was unjustly enriched in the amount of \$9,034,960.07. Affidavit of Dan Clarke, attached hereto as Exhibit 6, ¶ 5.

### **Arguments and Authorities**

In *South Western Oklahoma Development Authority v. Sullivan Engine Works, Inc.*, 1996 OK 9, 910 P.2d 1052, the Oklahoma Supreme Court pronounced a two-prong test for adjudging a participant or provider of aid liable in connection with the sale of securities. The required elements of proof under Section 408 of the Predecessor Act are: (1) that the seller is liable [for

making untrue statements of material fact or material omissions in connection with the sale of securities]; and (2) that the defendant aided or materially participated in the sale of securities by the seller or had control over the seller. *Id.* at 1058.

Defendants continue to rely on their narrowly defined theory of this case, that is, the accused participant or provider of material aid must be directly involved in the solicitation and/or negotiation of a sale of a security. Consequently, Defendants limit the recitation of their perceived material facts to the lack of direct communications between the Defendants and Lenard Briscoe, Stephen Pollard, Loren Pollard or the trustee of the W.R. Mathews Trust. As stated above, Plaintiff does not dispute the lack of such direct communications as to Defendants John V. Anderson and John Tom Anderson.<sup>1</sup> However, in connection with a securities fraud claim, “aiding and abetting liability extends beyond persons who engage, even indirectly, in [the] proscribed activity; aiding and abetting liability reaches persons who do not engage in the proscribed activities at all, but who give a degree of aid to those who do.” *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176 (1994).

Facts relating to the Defendants’ knowledge of and acquiescence to the check kite and Ponzi scheme operated through the Schubert F&M Account become material when a broader range of conduct constituting participation and/or material aid is considered utilizing legal precedents under state and federal law. *Klein v. Oppenheimer & Co., Inc.*, 130 P.3d 569, 584 (Kan. 2006) (courts interpreting state statutes with a provision similar to that in Section 408 of the Predecessor Act have taken a broad view of conduct that may support a finding of joint and several liability). Not all of the material facts, relating to the scope of Defendants’ conduct, necessary to decide this matter were included by Defendants in their motion. As a result,

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<sup>1</sup> Plaintiff notes that Ed Stanton, while senior vice-president of F&M Bank, endorsed the investment opportunity through Schubert and Associates to certain Schubert investors. *Transcr. Depo. Ed Stanton*, attached hereto as Exhibit 7, pp. 27-32. See also *Transcr. Depo. Chad Johnson*, attached hereto as Exhibit 8, p. 50 lines 16-24.

Defendants' motion for summary judgment should be denied on this basis alone. Summary judgment is not appropriate if all of the material facts are not addressed by the moving party. *Strong v. Hanover Insurance Co.*, 2005 OK CIV APP 9, 106 P.3d 604, 607.

**DEFENDANTS PARTICIPATED WITH OR PROVIDED MATERIAL AID TO  
MARSHA SCHUBERT**

Defendants' arguments can be divided into two parts: (1) the conduct that may constitute participation or material aid, and (2) those persons who may be adjudged jointly and severally liable for such participation or aid. Defendants attempt to attack a broader view of conduct supporting joint and several liability by arguing that the federal securities statutes, *as a whole*, "may not be read expansively" when considering the scope of prohibited conduct. Defendants cite to *Central Bank of Denver*, the landmark case holding that private civil liability does not extend to those who aid and abet a securities violation under Section 10(b) of the Securities Exchange Act of 1934 (Section 10(b)). *Central Bank of Denver*, at 184-185. While Defendants note that they omitted citations and internal quotations from the quoted provision in their brief, Defendants fail to note their omission of the regulatory references that are the subject of the Supreme Court's opinion, that is, references to Section 10(b) and Rule 10b-5 to which the *Central Bank* decision is limited. *Id.* at 173. Thus, Defendants' apply the *Central Bank* holding with a very broad brush.

Further, Defendants cite to *Central Bank* in their argument to limit the scope of culpable conduct under Oklahoma's securities laws. As reflected in its ruling in *South Western Oklahoma Development Authority*, the Oklahoma Supreme Court distinctly rejected the application of the holding in *Central Bank* to actions brought under Section 408 of the Predecessor Act. *Id.* at 1058-1059. The Court clearly concluded that joint and several liability may be imposed against

a participant or provider of material aid based on the express language of Section 408 of the Predecessor Act - language that does not appear under federal law. *Id.*

Arguments for narrowly construing Section 408 of the Predecessor Act and Section 1-509 of the Act are contrary to case law and other Oklahoma securities law provisions. For example, it is an established tenet of statutory construction that statutes, like the securities laws, should be construed broadly to effectuate their remedial purpose. *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). In addition, Section 501 of the Predecessor Act and Section 1-608 of the Act promote a general policy to maximize uniformity in regulation among states as well as with related federal regulation; *see also, Howell v. Ballard*, 1990 OK CIV APP 92, 801 P.2d 127, 128; *Mayfield v. H.B. Oil & Gas*, 1987 OK 106, 745 P.2d 732, 736 (Oklahoma Securities Act is to be construed “so as to make uniform the laws of those states which have enacted the Uniform Securities Act”); *Day v. Southwest Mineral Energy, Inc.*, 617 P.2d 1334, 1339 (Okla. 1980) (Oklahoma Supreme Court adopted the interpretative history of the federal securities laws when interpreting the securities statutes of this state).

Defendants’ also rely on irrelevant cases relating to rules of statutory construction of their apparent random choosing. Their reliance on *Huffman v. Oklahoma Coca-Cola Bottling Company*, 1955 OK 76, 281 P.2d 436; *Oklahoma City Zoological Trust v. State of Oklahoma ex rel. Public Employees Relations Board*, 2007 OK 21, 158 P.2d 461; *Savage v. Burton*, 2008 OK CIV APP 20, 178 P.3d 205; and *Broadway Clinic v. Liberty Mutual Insurance Co.*, 2006 OK 29, 139 P.3d 873, is misplaced as to the matter at hand.

Unlike the securities provisions pertinent to this case, the statutes construed by the Court in *Huffman* and *Oklahoma City Zoological Trust* contained specific language clearly limiting application of the statutes to a certain class of cases or persons. For example, the issue in

*Huffman* related to the statutory list of occupations for which the legislature restricted employment of children under sixteen years of age. In *Oklahoma City Zoological Trust*, the statute in question limited the application of the Municipal Employees Collective Bargaining Act to entities created and controlled by the State of Oklahoma or a municipality. The complete quote from *Huffman* that debunks Defendants' assertions follows:

[w]here the language of the statute is clear **in limiting its application to a particular class of cases** and leaves no room for doubt as to the intention of the legislature, there is no authority to transcend or add to the statute which may not be enlarged, stretched, or expanded, or extended to cognate or related cases not falling within its provisions. *Id.* at 440. (Emphasis added.)

Conveniently, Defendants ignore the limiting language in *Huffman* and misapply this rule of construction to securities statutes that do not limit their application to a particular case or class. Sections 408 of the Predecessor Act and 1-509 of the Act do not contain limiting language like that of the pertinent statutes in *Huffman* and *Oklahoma City Zoological Trust*. The language of the securities statutes neither describes the conduct that constitutes participation or aid nor limits in any way the culpable conduct constituting participation with or material aid to a violator of this state's securities laws.

With respect to their position on the persons who may be adjudged jointly and severally liable under Oklahoma securities laws, Defendants present another disingenuous argument based on *Savage* and *Broadway Clinic*.<sup>2</sup> Section 1-509(G) of the Act provides as follows:

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:

\* \* \*

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<sup>2</sup> Due to the differing language in the pertinent statutes in *Savage* and *Broadway Clinic*, the argument is not applicable to Section 408 of the Predecessor Act. Section 408 (b) provides in pertinent part as follows: "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 . . . ."

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.

Under the principle of *ejusdem generis*, the words of paragraph 5 of Section 1-509(G) should be interpreted as applying to the same general class of persons described in paragraphs 1 through 4. However, in footnote 9 of their brief, the Defendants tie the general reference in paragraph 5 *only* to the class of persons enumerated in paragraph 4. As a result, Defendants mistakenly conclude that a person subject to joint and several liability must necessarily be a regulated person and a participant “in a specific securities transaction.”

Clearly, the persons described in paragraphs 1-3 of Section 1-509(G) are not necessarily engaged in the securities industry or subject to the Department’s regulatory jurisdiction. Defendants are asking this Court to ignore the statutory language and to narrowly construe paragraph 5 of Section 1-509(G) to exclude any person neither involved in the securities industry nor engaged in the promotion of the sale of the security. This interpretation makes the language of paragraphs 1 through 3 superfluous. Defendants are clearly wrong.

In an attempt to avoid deference to the Department, Defendants claim that Plaintiff’s theory of the case is unreasonable and without merit. However, the United States Supreme Court has recognized the role of a governmental agency in interpreting the statutes over which the agency has administrative and enforcement authority. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Daniel*, 439 U.S. 551, 556 (1979). The role of the agency in that process is governed by the clear meaning of the statute based on “language, purpose and history.” *Id.* Further, the agency’s interpretation “should be upheld unless it is unreasonable.” *SEC v. Zandford*, 535 U.S. 813, 819-820 (2002).

State courts have followed the same rule of statutory construction. In *Oklahoma Department of Mines v. Dahlgren*, 1999 OK 95, ¶ 15, 995 P.2d 1103, 1108, the Supreme Court stated that a governmental enforcement agency “must be given great deference to proceed in a manner it considers in the best interests of all parties involved.” [Citation omitted.] Likewise, in *Brant v. Bank of America*, 31 P.3d 952, 958 (Kan. 2001), the Kansas Supreme Court, quoting *In Re Application of Zivanovic*, 929 P.2d 1377 (Kan. 1996), stated:

Usually, interpretation of a statute by an administrative agency charged with the responsibility of enforcing that statute is entitled to great judicial deference. [Citation omitted.] The agency’s interpretation of a challenged statute may, in fact, be entitled to controlling significance in judicial proceedings. Further, if there is a rational basis for the agency’s interpretation, it should be upheld on judicial review. [Citation omitted.] [Citations omitted in original.]

Deference to the Department of Securities in this case is appropriate because the Oklahoma Legislature delegated to it the responsibility of enforcement of this state’s securities laws. Plaintiff’s interpretation is reasonable and has merit. Plaintiff contends that its reliance on Section 408 of the Predecessor Act and Section 1-509 of the Act is supported by the commonly accepted meaning of the statutory provisions and the material facts present in this case. Those material facts, with evidentiary support, are set forth in paragraphs 1-51 of Plaintiff’s motion for summary judgment. Exhibit 1 hereto.

Defendants do not raise an issue as to the first element of proof: the existence of an underlying securities violation. It is also beyond dispute that Defendants rendered banking services to Schubert as she committed her securities fraud. The evidence presented by Plaintiff establishes that the Defendants provided aid to or materially participated in Schubert’s fraud.

The methods by which a person can provide assistance to the primary wrongdoer vary from case-to-case for purposes of establishing joint and several liability. Further, whether those methods constitute participation or aid “is determined upon the facts of each case and not by a

fixed rule of law.” *Luallin v. Koehler*, 644 N.W. 2d 591, 596 (N.D. 2002).<sup>3</sup> For secondary liability to attach, it is **not** necessary for the defendant to have acted in the offers and sales of the securities or to have made the fraudulent misrepresentations or omissions. *U.S. v. Mayo*, 646 F.2d 369, 371 (9<sup>th</sup> Cir. 1981); *U.S. v. Kessi*, 868 F.2d 1097, 1105 (9<sup>th</sup> Cir. 1989); *Kahn v. Chase Manhattan Bank, N.A.*, 760 F.Supp. 369, 374 (S.D.N.Y. 1991). Furthermore, it is **not** necessary for the accused to have knowledge of the misrepresentations, omissions or any other details of the underlying fraud. *Woods v. Barnett Bank of Fort Lauderdale*, 765 F.2d 1004, 1012 (11<sup>th</sup> Cir. 1985). In short, joint and several liability can be derived solely from the unlawful conduct of the seller. *Ainslie v. First Interstate Bank of Oregon, N.A.*, 939 P.2d 125, 137 (Or. Ct. App. 1997).

There are but a few times that the courts have considered conduct that constitutes aid or material participation in connection with the sale of securities under Oklahoma law. *See Howell*, 1990 OK CIV APP 92; *Odor v. Rose*, 2008 WL 2557607 (W.D. Okla. 2008). However, the facts of these cases have, by mere coincidence, involved the most basic form of aid or material participation: the direct involvement in the solicitation or negotiation of the securities transaction. Case law demonstrates a broader range of conduct constituting participation or material aid. The legal support for this position is presented in Plaintiff’s Motion.

As to aiding and abetting by a bank, the basic proposition is that routine or regular banking practices cannot form the basis for liability under the securities laws. Conversely, employing unreasonable or atypical banking practices is a basis for such liability. The case of *Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 97 (5<sup>th</sup> Cir. 1975), is frequently cited for the proposition that banking assistance “constituting the daily grist of the mill” is insufficient to

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<sup>3</sup> This very statement by the court is contrary to the argument Defendants make in Section C.2 of their brief in support.

establish joint and several liability. However, “if the method or transaction is atypical or lacks business justification,” joint and several liability can be imposed. *Id.*

There are multiple cases in which affirmative acts by banks have been interpreted by the federal courts to equate to “substantial assistance” in cases brought under an “aiding and abetting” theory. See *Sell v. Zions First National Bank*, 2006 WL 322469 (D. Ariz.); *Bald Eagle Area School District v. Keystone Financial Inc.*, 1999 WL 719906 (W.D. Pa.); *Aetna Casualty & Surety Co. v. Leahey Construction Co., Inc.*, 219 F.3d 519 (6<sup>th</sup> Cir. 2000); *Ainslie v. First Interstate Bank of Oregon, N.A., et al.*, 939 P.2d 125 (Or. App. 1997); *State v. Diacide Distributors, Inc.*, 561 N.W.2d 369 (Iowa 1997); *Vendsouth, Inc. v. Arth*, 2003 WL 22399581 (Bkrcty. M.D.N.C.); *Lawyers Title Insurance v. United American Bank*, 21 F.Supp. 2d 785 (W.D. Tenn. 1998); *Neilson v. Union Bank of California, N.A.*, 290 F.Supp. 2d 1101 (C.D. Cal. 2003); *Judson v. Peoples Bank and Trust Co.*, 134 A.2d 761 (N.J. 1957); *Kelly v. Central Bank & Trust Co. of Denver*, 794 P.2d 1037 (Colo. App. 1990); and *Grace v. Corn Exchange Bank Trust Co.*, 38 N.E.2d 449, 453, (N.Y. 1941). In these cases, the bank’s participation with or aid to the primary wrongdoer did not include the solicitation or negotiation of the sale of a security.

#### **DEFENDANTS DO NOT HAVE THE STATUTORY AFFIRMATIVE DEFENSE**

A defendant may escape joint and several liability under the Predecessor Act by showing he did not know, and could not have known, of the existence of the facts on which the seller’s liability is based. See Section 408(b) of the Predecessor Act.<sup>4</sup> With no Oklahoma cases addressing the knowledge factor as an affirmative defense, the holding of the Oregon court in *Prince v. Brydon*, 764 P.2d 1370 (Or. 1988), provides guidance. The Oregon court in *Prince* stressed that knowledge is relevant only as an affirmative defense noting that the drafters of the

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<sup>4</sup> Section 1-509 of the Act provides an affirmative defense if the accused does 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.

Oregon securities statutes “took pains to make clear that the relevant knowledge is of ‘the existence of the facts,’ not of the unlawfulness of a sale.” *Id.* at 1372. Although the provision may appear to impose a heavy burden on the accused who is attempting to exonerate himself, the legislature’s choice of language was deliberate. *Id.* Knowledge of the “existence of the facts” was the relevant factor deliberately chosen by the Oklahoma Legislature in establishing the affirmative defense under this state’s securities laws. Section 408(b) of the Predecessor Act and Section 1-509 of the Act.

While knowledge is pertinent only as an affirmative defense under Oklahoma securities statutes, the knowledge of the accused is an element of proof for a plaintiff under federal law. *Woodward*, 552 F.2d 94-95. As the test for determining the liability of an alleged aider and abettor has evolved, the federal courts have concluded that the “substantial assistance” and “knowledge” elements should be considered in relation to each other and not in isolation. *SEC v. Nacchio*, 2009 WL 690306 (D. Colo.) at \*7. Specifically, “the more acute a party’s knowledge of the ongoing fraudulent scheme, the less substantial the acts constituting substantial assistance need be, and *vice-versa*.” *Id.*

When evaluating the knowledge of the defendant in *Diacide*, the court incorporated a similar test:

[a] party who engages in atypical business transactions or actions which lack business justification may be found liable as an aider and abettor with a minimal showing of knowledge. Conversely, a party whose actions are routine and part of normal everyday business practices would need a higher degree of knowledge for liability as an aider and abettor to attach.

*Diacide* at 378, citing *Camp v. Dema*, 948 F.2d 455, 459 (8<sup>th</sup> Cir. 1991).

The *Diacide* court described the evidence on which it relied to establish the knowledge of the defendant as “circumstantial” but “persuasive and largely undenied.” *Id.* at 381-382. As

stated by the *Woodward* court, “knowledge” of the existence of a securities violation by the accused aider and abettor must usually be inferred; knowledge does not have to be proven by direct evidence but may be proven by circumstantial evidence based on the facts submitted. *Woodward* at 95-97.

A determination that the requisite knowledge by the defendant bank to support the aiding and abetting claim in *Vendsouth, Inc. v. Arth* was also based largely on circumstantial evidence: the number of checks drawn on uncollected funds, the fact that the check kite extended over a period of seventeen (17) months, and the size and nature of the checks deposited. *Vendsouth*, 2003 WL 22399581 \*17. Specifically, the “on us” checks were 1,250 in number and totaled \$106,000,000 in amount; the checks were deposited on nearly a daily basis; many of the checks were for amounts greater than \$100,000 and some were for amounts greater than \$200,000; the deposited checks were not remittances from customers; and there were almost continuous negative uncollected balances in the debtor’s account. *Id.* The court ultimately concluded as to the aiding and abetting claim that:

[t]aken together, [the bank’s] knowledge of the “on us” deposits combined with the benefits to the bank by the continuation of the fraud and the fact that but for the continued acceptance of the “on us” checks and granting of provisional credit, the check kite could not have continued, the plaintiff has put forth evidence of sufficient facts to defeat [the bank’s] motion for summary judgment. *Id.* at \*18.

Except as to degree, the critical facts cited above by the *Vendsouth* court parallel the uncontroverted facts in the case at hand. While the Defendants’ conduct here is much more egregious, the result is still the same. Like the defendants in *Diacide* and *Vendsouth*, the Defendants materially aided Schubert’s securities fraud by consciously deciding to allow Schubert to operate a massive, illegal check kite over a period of many months, while financially benefiting from the receipt of fees and interest charges.

Defendants claim to have no knowledge of Schubert's misrepresentations and omissions because they did not communicate with short investors and were not present during communications between Schubert and the investors. However, knowledge of bank officers is knowledge of the bank concerning matters coming within the scope of their authority. *Curtis v. Connly*, 257 U.S. 260, 264 (1921); *First National Bank of Kiowa v. Mee*, 1927 OK 267, 259 P. 523, 527. Bank officers and employees, Ed Stanton, Chad Johnson, Justin Tarrant, and Beth Armer, had first hand knowledge of Schubert's investment program as they were purported investors. The knowledge gained by the individual bank officers and employees was closely intertwined with their duties at F&M Bank. For instance, loan officers Johnson and Tarrant were involved in making loans to Schubert; it would have been within the scope of their duties to investigate Schubert's financial condition and business in connection with making those loans.

Although the Andersons may not have personally spoken with investors or had first hand knowledge of the representations that Schubert was making, the bank officers discussed their "investments" freely within the bank and in the presence of the Andersons. The bank officers' participation in Schubert's investment opportunity was common knowledge within the bank and in the community. John V. Anderson stated in his interview with the FBI that he thought the returns being made by the bank officers were "too good to be true." Such knowledge of Defendant John V. Anderson was knowledge of F&M Bank. At the very least, the disclosures made by the bank officers to the Andersons put the Andersons on notice that they should make further inquiry. *State v. Emery*, 1918 OK 466, 174 P. 770, 772.

Briscoe's testimony as to Defendants' awareness of his investments is not relevant. The relevant factor is *Defendants'* knowledge or awareness of the deposits into the Schubert F&M Account of Briscoe's "large item" checks dated May 19, 2004, and October 4, 2004, and the lack

of a corresponding purchase of securities by Marsha Schubert. Likewise, the Pollards' testimony as to Defendants' awareness of the investments by L&S Pollard Farms, LLC (LLC), is not relevant. The relevant factor is *Defendants'* knowledge or awareness of the deposits into the Schubert F&M Account of the LLC's "large item" third-party checks dated May 31, 2004; June 9, 22, 24 and 28, 2004; and October 1, 2004, and the lack of a corresponding purchase of securities by Marsha Schubert. Further, Mathews' testimony as to Defendants' awareness of the investments by the trust is not relevant. Once again, the relevant factor is *Defendants'* knowledge or awareness of the deposits of checks from the trust into the Schubert F&M Account.

The final proposition in Defendants' motion for summary judgment involves the tracing of funds. Contrary to Defendants' assertions, Plaintiff has been able to trace the claimed losses of the Short Investors to Schubert.

### CONCLUSION

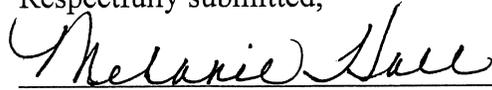
Defendants' motion for summary judgment should be denied because they failed to address all material facts and such motion is not appropriate as a matter of law. Schubert unequivocally states that she relied on the float created by her check kite to make the continual distributions of fictitious investment returns. Defendants' tolerance and acquiescence to Schubert's check kite, by paying the distribution checks drawn on uncollected funds, was "intrinsically related to" and "in connection with" the sale of securities. Schubert created the illusion of Schubert and Associates as a prospering and legitimate company – an illusion that induced the Short Investors to invest. The Defendants' failure to stop Marsha Schubert's banking practices further concealed Schubert's fraudulent misrepresentations and omissions and enabled the continuation of her scheme resulting in the financial losses to the Short Investors.

Participation in the daily loan committee meetings provided Defendants with access to all “Large Item” transactions effected through the Schubert F&M Account. The Defendants’ involvement in Schubert’s check kite clearly evidences their connection to the use and misuse of investor funds and to the fraudulent sales of securities by Schubert. Any “conduct undertaken to keep a securities fraud Ponzi scheme alive is conduct undertaken in connection with the purchase and sale of securities.” *Sell v. Zions First National Bank*, 2006 WL 322469 (D. Ariz.) at \*11 (citation omitted).

Schubert made the payments of fictitious profits by issuing checks drawn on uncollected funds and relying on the float created by a check kite. With knowledge of the activity in and through the Schubert F&M Account, Defendants allowed a Ponzi scheme and a check kite to perpetuate over the years. The actions of Defendants herein were atypical, knowing and purposeful, and therefore, not in conformance with normal banking practice.

Defendants provided aid to or materially participated in Marsha Schubert’s fraudulent activities and are jointly and severally liable to the same extent as Marsha Schubert pursuant to Section 408 of the Predecessor Act and Section 1-509 of the Act. The facts stated in Plaintiff’s Motion and evidentiary materials attached thereto establish that no genuine issue of material fact exists regarding the Plaintiff’s cause of action, and as such, Plaintiff is entitled to summary judgment against Defendants. Further, Plaintiff is entitled to summary judgment as a matter of law. Defendants’ motion should be denied.

Respectfully submitted,



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Oklahoma Department of Securities

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Attorneys for Plaintiff, Oklahoma

## CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the *Plaintiff's Response to Defendants' Motion for Partial Summary Judgment*, was mailed this 14th day of May, 2009, by depositing it in the U.S. Mails, postage prepaid, to the following counsel of record:

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IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT  
OKLAHOMA COUNTY, OKLA.

MAY - 8 2009

PATRICIA PRESLEY, COURT CLERK  
by \_\_\_\_\_  
DEPUTY

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. )

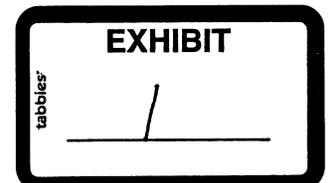
Case No. CJ-2006-3311

**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Plaintiff, Oklahoma Department of Securities, *ex rel.* Irving L. Faught, Administrator, pursuant to Rule 13, Rules for the District Courts of Oklahoma, moves for summary judgment against Defendants Farmers & Merchants Bank, Farmers & Merchants Bancshares, Inc., John V. Anderson, and John Tom Anderson (collectively, the "Defendants"). Based on the uncontroverted facts and authority set forth herein, summary judgment should be entered against Defendants.

**STATEMENT OF MATERIAL FACTS**

1. Farmers & Merchants Bank (F&M Bank) is a state chartered bank located in Crescent, Oklahoma. *Admitted in Defendants' Answer*, attached hereto as Ex. A, ¶ 1.
2. Farmers & Merchants Bancshares, Inc. (Bancshares), an Oklahoma corporation, is the holding company of F&M Bank, N.A., *Admitted in Defendants' Answer*, Ex. A, ¶ 2.



3. John V. Anderson, an individual, resides in or near Crescent, Oklahoma. John V. Anderson is, and at all times material hereto was, Chairman of the Board of Directors of F&M Bank. John V. Anderson and his wife own controlling interests in Bancshares. *Admitted in Defendants' Answer*, Ex. A, ¶ 3.

4. John Tom Anderson, an individual, resides in or near Crescent, Oklahoma. John Tom Anderson is, and at all times material hereto was, President/Chief Executive Officer and a director of F&M Bank. John Tom Anderson, the son of John V. Anderson, owns an interest in Bancshares. *Admitted in Defendants' Answer*, Ex. A, ¶ 4.

5. From May of 1992 to April of 2004, Marsha Schubert (Schubert) was registered as a broker-dealer agent of AXA Advisors, LLC (AXA), a registered broker-dealer and investment adviser. From May of 2000 to April of 2004, Schubert was registered as an investment adviser representative of AXA. In May of 2004, Schubert became registered as a broker-dealer agent of Wilbanks Securities, Inc., a registered broker-dealer. Aff. of Carol Gruis attached hereto as Ex. B, ¶¶ 4-6.

6. At all times material hereto, Schubert owned account number 34-7477 at F&M Bank (Schubert F&M Account) and account number 35-9424 at F&M Bank (Kattails Account) (collectively, the "F&M Accounts"). Kattails was a small retail business in Crescent, Oklahoma, owned in part by Schubert. Aff. of Dan Clarke, Ex. C, ¶¶ 3 and 12.

7. Prior to December 2002, the Schubert F&M Account was classified as a personal account. The status of the account was changed from personal to business in December 2002. Clarke Aff., Ex. C, ¶ 5.

8. Schubert, doing business as Schubert and Associates, perpetrated a securities fraud 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). Aff. of Marsha Kay Schubert attached hereto as Ex. D; Order of Permanent Injunction attached as Ex. E, *Oklahoma Department of Securities ex rel. Irving L. Faught, Administrator v. Marsha Schubert, et al.*, CJ 2004-256.

9. Between December of 1999 and October of 2004 (the "Relevant Period"), Schubert deposited funds in excess of Two Hundred Sixty-Five Million Dollars (\$265,000,000) into the Schubert F&M Account. Clarke Aff., Ex. C, ¶ 6.

10. During the Relevant Period, Schubert, doing business as Schubert and Associates, accepted funds from investors in excess of Two Hundred Million Dollars (\$200,000,000). Clarke Aff., Ex. C, ¶ 7. Schubert promised large profits from the investments she would make on their behalf. Schubert Aff., Ex. D, ¶ 5.

11. In connection with the fraudulent sales of securities, Schubert represented to investors that she would invest their funds in a legitimate venture and return large profits resulting from the success of the investments. Schubert Aff., Ex. D, ¶ 5.

12. When she accepted their investment dollars, Schubert did not tell investors: (a) that she was committing securities fraud; (b) that she was violating state and federal securities laws; (c) that she was not going to invest their monies; (d) that she was acting outside the scope of her association with the brokerage firm with which she was registered; and/or (e) that she was perpetuating a "Ponzi" scheme. Schubert Aff., Ex. D, ¶ 21.

13. The majority of the investment proceeds obtained by Schubert were deposited into the Schubert F&M Account where the proceeds were commingled with proceeds of bank

loans and her personal funds. A portion of the investment proceeds was deposited into the Kattails Account. Clarke Aff., Ex. C, ¶ 7.

14. Schubert did not make the investments that she represented to investors she would make. Investor funds, Schubert's personal funds and borrowed capital from F&M Bank were the only sources of revenue for Schubert and Associates. Schubert used these sources of funds to make payments of fictitious investment returns to her investors. Schubert Aff., Ex. D, ¶¶ 6, 7 and 9.

15. Payments of fictitious investment returns were necessary to create the appearance of legitimacy and success that enabled Schubert to continue the securities fraud for as long as she did. Schubert Aff., Ex. D, ¶ 8.

16. Initially, Schubert used funds from her personal and business bank accounts and her husband's farm account, for which she was an unauthorized signatory, to pay fictitious investment returns to investors. As the balances in those accounts became inadequate to cover the returns she told investors that they had made, Schubert borrowed money and also used the commingled investor funds to pay the fictitious returns. Schubert Aff., Ex. D, ¶ 9.

17. When she paid fictitious investment returns to investors, Schubert did not tell them (a) that the payments were anything other than a return on their investments; (b) that the primary source of the payments was other investors' monies; and/or (c) that the checks and wires were drawn on insufficient or uncollected funds. Schubert Aff., Ex. D, ¶ 22.

18. Investors have testified in depositions taken in this matter that they did not know, and that they would not have invested through Schubert and Associates *if* they had known, any one of the following facts: (a) that Schubert was committing securities fraud; (b) that she was not going to invest their monies as promised; (c) that she was acting outside the scope of her

association with the brokerage firm with whom she was registered; (d) that she was orchestrating and perpetuating a “Ponzi” scheme; (e) that a primary source of the payments of investment returns was other investors’ monies; and/or (f) that she was orchestrating and perpetuating a check kite. Transcr. Depo. Lenard Briscoe, Ex. F; 38:25-39:24; Transcr. Depo. Stephen Pollard, Ex. G, 35:21-37:10; Transcr. Depo. Robert Mathews, Ex. H, 76:17-24; Transcr. Depo. Loren Pollard, Ex. I, 11:19-12:12.

19. Investors lost in excess of Nine Million Dollars (\$9,000,000) in the Ponzi Scheme (Short Investors). Clarke Aff., Ex. C, ¶ 8. Sixty-Seven (67) Short Investors with outstanding losses totaling \$3,558,026.56 still remain. Aff. of Doug Jackson, Ex. J, ¶¶ 11-12.

20. As a result of her fraudulent conduct, Schubert was enjoined and ordered by the Logan County District Court to make restitution. Order of Permanent Injunction attached as Ex. E, *Oklahoma Department of Securities ex rel. Irving L. Faught, Administrator v. Marsha Schubert, et al.*, CJ 2004-256.

### **The Check Kite**

21. To further prevent the discovery of the truth about her activities, Schubert devised a scheme involving a continual movement of funds between third party bank accounts that she controlled and the F&M Accounts. Relying on the float created by this activity, Schubert paid fictitious investment returns using insufficient and/or uncollected funds in the Schubert F&M Account. Schubert Aff., Ex. D, ¶ 10; Clarke Aff., Ex. C, ¶¶ 17-36.

22. The third party bank accounts that Schubert used extensively to continue the securities fraud were those of Lance Berry (Berry), Bob Mathews (Mathews) and Marvin Wilcox (Wilcox). Schubert Aff., Ex. D, ¶ 11; Clarke Aff., Ex. C, ¶¶ 27-36.

23. On at least one occasion, Chad Johnson (Johnson), an F&M loan officer, suggested to Schubert that Berry, Mathews and Wilcox open accounts at F&M for their investment purposes in order to eliminate the reoccurring uncollected funds issue in the Schubert F&M Account. Schubert Aff., Ex. D, ¶ 15; Transcr. Depo. Chad Johnson, Ex. K, 59:2-13.

24. Schubert stopped using the F&M accounts of Berry, Mathews and Wilcox because good or collected funds were not attainable in the Schubert F&M Account or the F&M accounts of Berry, Mathews and Wilcox. Schubert Aff., Ex. D, ¶ 15.

25. In the end, Mathews was unjustly enriched in an amount in excess of Five Hundred Twenty Thousand Dollars (\$520,000). Wilcox was unjustly enriched in an amount in excess of Five Hundred Thousand Dollars (\$500,000). Berry was unjustly enriched in an amount in excess of Thirty-Three Thousand Dollars (\$33,000). Clarke Aff., Ex. C, ¶¶ 33-35.

26. As earlier investors received their purported investment returns, the word spread to other persons who then invested with Schubert. Short Investors invested with Schubert after hearing of the returns Berry, Mathews and Wilcox were receiving. Briscoe Transcr. Depo., Ex. F, 9:11-14; Stephen Pollard Transcr. Depo., Ex. G, 9:4-12.

#### **Defendants' Involvement**

27. At all times material hereto, the F&M Bank loan committee met each business day to review the previous day's business. The loan committee members reviewed new requests for loans, renewed loans, extensions or deferrals of loans, overdrafts, and "large items." *Admitted in Defendants' Answer*, Ex. A, ¶ 93.

28. F&M Bank defined a "large item" as any deposit into an F&M Bank account or any check drawn on an F&M Bank account in an amount greater than Twenty-Five Hundred Dollars (\$2,500). *Admitted in Defendants' Answer*, Ex. A, ¶ 94. Seventy-seven percent (77%)

of the number of deposits into the Schubert F&M Account were “large items.” Clarke Aff., Ex. C, ¶ 11.

29. During the Relevant Period, John V. Anderson, John Tom Anderson, and Johnson served on the F&M Bank loan committee. Johnson Transcr. Depo., Ex. K, 40:18 -41:4.

30. Ed Stanton (Stanton ) and Justin Tarrant (Tarrant) served on the F&M Bank loan committee until their departures from the bank in March of 2004. Stanton Transcr. Depo., Ex. L, 8:2-12; Transcr. Depo. Justin Tarrant, Ex. M, 13:6-8, 68:7-14.

31. Johnson, Stanton, and Tarrant received “large item” distributions of purported investment returns from the Schubert F&M Account. Clarke Aff., Ex. C, ¶¶ 60-78.

32. Jordan Carris served on the F&M Bank loan committee beginning in June of 2004 and regularly observed the Schubert F&M Account on the bank’s internal reports relating to uncollected fund balances. Transcr. Depo. Jordan Carris, Ex. N, 14:18-15:11, 17:23-18:15.

33. Pursuant to F&M Bank policy, all outgoing wire transfers required advance approval by a loan officer. *Admitted in Defendants’ Answer*, Ex. A, ¶ 95.

#### **Knowledge of Defendants**

34. John V. Anderson assumed responsibility for addressing the issues raised by the uncollected fund balances in the Schubert F&M Account. Johnson Transcr. Depo., Ex. K, 134:14-21; Stanton Transcr. Depo., Ex. L, 36:9-19, 48:18-20.

35. John V. Anderson frequently reviewed the Schubert F&M Account and was aware that Schubert was routinely operating on large uncollected balances in that account. Transcr. Depo. Melissa Moon, Ex. O, 22:4-15, 31:1-9. John V. Anderson reviewed the deposits made into the Schubert F&M Account that were set aside by F&M Bank tellers as the deposits

were made, at the request of John V. Anderson. Transcr. Depo. Beth Armer, Ex. P, 35:1-20; Johnson Transcr. Depo., Ex. K, 134:2-13.

36. John V. Anderson discussed the uncollected fund balances in the Schubert F&M Account during many of the morning loan committee meetings. Stanton Transcr. Depo., Ex. L, 36:12-15; Carris Transcr. Depo., Ex. N, 12:4-11; Moon Transcr. Depo., Ex. O, 50:19-52:4.

37. On multiple occasions, John V. Anderson communicated with Schubert about getting her F&M Accounts into a collected fund status and requested collateral to secure the uncollected balances in those accounts. Schubert Aff., Ex. D, ¶ 14; FBI Form 302, Ex. Q.

38. When Schubert continued to operate on a large uncollected balance, John V. Anderson directed that the Schubert F&M Account be reclassified from a personal checking account to a business account in December of 2002. Thereafter, F&M Bank treated the uncollected balances in the Schubert F&M Account as unsecured loans, and the bank assessed a service charge each month on the average uncollected balance in the Schubert F&M Account. FBI Form 302, Ex. Q. The first such service charge was assessed in January of 2003. Clarke Aff., Ex. C, ¶ 26.

39. John V. Anderson knew that Schubert was kiting checks between her F&M Accounts and the bank accounts of other persons at NBanC in Kingfisher, Oklahoma, on a very regular basis. FBI Form 302, Ex. Q.

40. John V. Anderson monitored the accounts of Berry, Mathews and Wilcox during the time that they maintained checking accounts at F&M Bank. Stanton Transcr. Depo., Ex. L, 40:10-14.

41. John V. Anderson knew that at least two of the F&M loan officers, Stanton and Johnson, invested through Schubert and Associates. John V. Anderson believed Stanton and

Johnson were receiving investment returns of 20-30% through Schubert and advised them that the rates seemed "too good to be true." FBI Form 302, Ex. Q.

42. John Tom Anderson knew that Schubert was operating on large uncollected balances in the Schubert F&M Account from the morning loan committee meetings. Stanton Transcr. Depo., Ex. L, 36:12-15; Carris Transcr. Depo., Ex. N, 12:4-11; Moon Transcr. Depo., Ex. O, 50:19-52:4.

43. On at least one occasion, John Tom Anderson talked with Dennis Themer, President of the Kingfisher, Oklahoma branch of NBanC, and learned that the NBanC accounts of Berry, Mathews and Wilcox used by Schubert in the check kite were operating on uncollected funds. Transcr. Depo. Dennis Themer, Ex. R, 38:5-24; Transcr. Depo. Jim Talkington, Ex. S, 45:19-46:22.

44. Johnson allowed Schubert to liquidate a maturing certificate of deposit owned by Schubert Implement, an entity owned by Leland Schubert, and deposit the proceeds into the Schubert F&M Account. Schubert had no authority over any account related to Leland Schubert. Schubert used the proceeds from the liquidation of the certificate of deposit to pay fictitious investment returns to investors. Schubert Aff., Ex. D, ¶ 20; Clarke Aff., Ex. C, ¶¶ 47-48.

45. F&M Bank transferred funds from an F&M Bank account for the estate of Leland Schubert to the Schubert F&M Account. Schubert was not authorized to make transfers from the F&M Bank account for the estate of Leland Schubert. Schubert used the transferred funds to pay fictitious investment returns. Schubert Aff., Ex. D, first ¶ 21; Clarke Aff., Ex. C, ¶¶ 43-46.

46. In the spring of 2004, Johnson spoke with Michael Brennan (Brennan), an outside consultant to F&M Bank, about his investment with Schubert and, specifically the lack of statements from her. Brennan raised the question of whether the activity might be a Ponzi

scheme. Johnson Transcr. Depo., Ex. K, 71:3-72:12; Transcr. Depo. Michael Brennan, Ex. T, 20:1-21:20.

47. Brennan also spoke with Melissa Moon, the Bank Secrecy Act officer for F&M Bank, regarding the possibility that Schubert's activities involved a Ponzi scheme. Brennan Transcr. Depo., Ex. T, 21:21-25; Moon Transcr. Depo., Ex. O, 13:16-24.

48. The uncollected fund balances in the Schubert F&M Account were in greater amounts than allowed in any other F&M Bank account. Moon Transcr. Depo., Ex. O, 53:1-20.

49. The Schubert F&M Account was allowed to operate on uncollected funds for a longer period of time than other F&M Bank customers. Stanton Transcr. Depo., Ex. L, 47:14-18.

50. Defendants did not follow normal banking practices in connection with the Schubert F&M Account. Aff. of Harry Potter, Ex. U; Jackson Aff., Ex. J, ¶¶ 9-10.

51. If, at any time, Defendants had refused to approve payment of the checks drawn on insufficient and/or uncollected funds, the payments of fictitious investment returns would have stopped and Schubert's fraud would have come to an end. Schubert Aff., Ex. D, ¶ 17.

### **ARGUMENTS AND AUTHORITIES**

#### **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. ANN. TIT. 12, Ch.2, App. (Rule 13).

## PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW

Oklahoma statutes establish a cause of action for participating in or providing aid to a fraudulent sale of securities. See Section 408 of the Predecessor Act and Section 1-509 of the Act. The pertinent statutes provide that a person, who is not himself the seller of the security, is liable in connection with the fraudulent sale of securities if he “materially participates” or provides “material aid” to the actual seller. Specifically, subsection (b) of Section 408 of the Predecessor Act, a uniform act provision, states as follows:

Every person who materially participates or aids in a sale or purchase made by any person liable [for making untrue statements of material fact or material omissions in connection with the sale of securities], 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.<sup>1</sup>

### I. REQUIRED PROOF FOR JOINT AND SEVERAL LIABILITY

In *South Western Oklahoma Development Authority v. Sullivan Engine Works, Inc.*, 1996 OK 9, 910 P.2d 1052 (Okla. 1996), the Oklahoma Supreme Court pronounced a two-prong test for adjudging a participant or provider of aid liable in connection with the sale of securities. The required elements of proof under Section 408 of the Predecessor Act are: (1) that the seller is liable [for making untrue statements of material fact or material omissions in connection with the sale of securities]; and (2) that the defendant aided or materially participated in the sale of securities by the seller or had control over the seller. *Id.* at 1058. A defendant may escape joint

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<sup>1</sup> The required elements of proof for providing material aid under Section 1-509 of the Act are the same as those under the Predecessor Act.

and several liability under the Predecessor Act by showing he did not know, and could not have known, of the existence of the facts on which the seller's liability is based.<sup>2</sup> See Section 408(b).

**A. First Element of Proof: Underlying Securities Violation**

The first element of proof has clearly been established in this case. Schubert was adjudged liable for securities fraud by the District Court of Logan County and ordered to make restitution to the Short Investors. Schubert's fraud was based on omissions and misrepresentations in connection with the sale of the securities.

The materiality of alleged misrepresentations and omissions is established using a "reasonable investor" test. That is, if a reasonable investor would have considered the information important in making his investment decision, the misrepresentations and omissions were material. *Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 93 (5<sup>th</sup> Cir. 1975); see also *Lloyds of America, LTD, v. Theoharous*, 2005 WL 3115329 (Okl. Dist.) at \*7. Short Investors have testified in depositions taken in this matter that they did not know, and that they would not have invested through Schubert and Associates if they had known, any one of the following facts: (1) that Schubert was committing securities fraud; (2) that she was not going to invest their monies as promised; (3) that she was acting outside the scope of her association with the brokerage firm with whom she was registered; (4) that she was orchestrating and perpetuating a Ponzi scheme; (5) that a primary source of the payments of investment returns was other investors' monies; and/or (6) that she was orchestrating and perpetuating a check kite. Thus, Schubert's misrepresentations and omissions were material.

Schubert admits in her affidavit attached hereto that she perpetuated her securities fraud through a Ponzi scheme and check kite. In a Ponzi scheme, "money from new investors is used

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<sup>2</sup> Pursuant to Section 1-509 of the Successor Act, a defendant is entitled to the affirmative defense if he shows that he did not know, and in the exercise of reasonable care could not have known, of the existence of the conduct on which the seller's liability is based.

to pay . . . earlier investors in order to create an appearance of profitability and attract new investors so as to perpetuate the scheme.” *In re Manhattan Investment Fund Ltd.*, 2007 WL 4440360 (S.D.N.Y.) at \*4. The payments to the earlier investors are made to “forestall disclosure of the fraud.” *Id.* at \*8. The court in *Bald Eagle Area School District v. Keystone Financial, Inc.*, 1999 WL 719906 (W.D. Pa.), in describing a Ponzi scheme stated:

The very nature of a Ponzi scheme means that the fraud continues over a period of time. In other words, the fraud is not limited to one transaction. The viability of the scheme rests upon keeping it afloat, and enticing others to invest. *Id.* at \*6.

The material misrepresentations and omissions Schubert made to just one investor harmed all investors because the misrepresentations and omissions allowed her to continue the Ponzi scheme and receive more and more investor money. *Neilson v. Union Bank of California, N.A.*, 290 F.Supp. 2d 1101, 1132 (C.D. Cal. 2003). Schubert kept her fraudulent scheme afloat and enticed others to invest by consistently making distributions of fictitious investment returns from her F&M Bank account with funds she did not have or funds that did not even exist. Any “conduct undertaken to keep a securities fraud Ponzi scheme alive is conduct undertaken in connection with the purchase and sale of securities.” *Sell v. Zions First National Bank*, 2006 WL 322469 (D. Ariz.) at \*11 (citation omitted).

Like Schubert’s Ponzi scheme, the fraud in *Sell* entailed distributions to investors who were told that the money they were receiving was the fruit of “bona fide, existing and performing loans.” The money was actually obtained from other investors who too believed they were investing in “bona fide, existing and performing loans.” *Id.* at \*9. The *Sell* court opined that “[t]he disbursement[s] of money from more recent investors to older investors . . . are, in other words, ‘in connection with’ securities fraud.” *Sell* at \*10. The plaintiffs in *Bald Eagle* claimed the defendant, acting as a custodial bank, enabled a securities fraud to continue by allowing the

primary wrongdoer to utilize monies in the custodial account to operate and conceal a Ponzi scheme. *Bald Eagle* at \*2. The court found the culpable conduct of the defendant bank was “intrinsically connected” to the Ponzi scheme and in connection with the purchase or sale of securities. *Id.* at \*6.

A check kite is illegal and by its very nature is a form of bank fraud. *Frost National Bank v. Parker*, 1999 WL 33438078 (C.D. Ill.) at \*1. Check kiting occurs:

when a person draws on an account at one bank, deposits the checks in another bank, and then secures the cash before the checks’ actual collection by the first bank. Further, check kiting involves the continual movement of funds from bank to bank. Due to such a scheme, the check-kiting customer’s account will show a positive balance due to deposits into the account. However, these are “ledger balances” which do not represent actual funds in the subject account.

*Oxford Bank & Trust v. Hartford Accident & Indemnity Co.*, 698 N.E. 2d 204, 207 (Ill. App. Ct. 1998). The “ledger balances” referenced above are also called “uncollected funds”, *i.e.*, funds posted to a bank customer’s account that have not been finally paid by the bank on which the funds were drawn. *Norwest Bank Black Hills, N.A. v. Rapid City Teachers Federal Credit Union* (No. 4122), 433 N.W.2d 560, 564 (S.D. 1988). By taking advantage of the delay in the check collection process, the successful check kiter has the use of the bank’s money, interest free, *if* the bank grants provisional credit for the deposited checks. *Frost* at \*1.

Schubert unequivocally states that she relied on the float created by her check kite to make the continual distributions of fictitious investment returns. In the heyday of the check kite, Schubert used her Schubert and Associates F&M Account and the NBanC accounts of Lance Berry, Bob Mathews and Marvin Wilcox (collectively, “BMW”).<sup>3</sup> Schubert effected her scheme by continuously repeating a cycle of writing checks to BMW for amounts exceeding her actual account balance, and then depositing checks written on the NBanC accounts of BMW to her

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<sup>3</sup> Early on in the fraud, Marsha Schubert similarly used the accounts of Johnny Stanbrough, the W.R. Mathews Trust and the Betty R. Mathews Trust.

Schubert F&M Account. F&M Bank granted provisional credit to the Schubert F&M Account based on these deposits, thereby covering the checks Marsha Schubert had just written to BMW and enabling Schubert to write other checks as well. Most of those “other checks” were written by Schubert to pay purported investment profits to her defrauded investors.

In *Aetna Casualty & Surety Co. v. Leahey Construction Co., Inc.*, 219 F.3d 519 (6<sup>th</sup> Cir. 2000), the primary wrongdoer manipulated its books for purposes of obtaining a surety bond on its construction projects. *Id.* at 524. The company’s assets were inflated on its financial statements by \$275,000 through the proceeds of a four-day bank loan made at month end. *Id.* at 535. Litigation resulted after the company defaulted on three bonded projects. *Id.* at 524. The court considered the loan to have established a critical level of credibility between the construction firm and the bonding company. *Id.* at 537. “Because this credibility served as the foundation for increased trust between the parties,” the court concluded that the bank substantially assisted the underlying fraud. *Id.*

It follows from *Sell* and *Bald Eagle* that the Defendants’ tolerance and acquiescence to Schubert’s check kite, by paying the distribution checks drawn on uncollected funds, was “intrinsicly related to” and “in connection with” the sale of securities. Schubert created the illusion of Schubert and Associates as a prospering and legitimate company – an illusion that induced the Short Investors to invest. The Defendants’ failure to stop Marsha Schubert’s banking practices further concealed Schubert’s fraudulent misrepresentations and omissions and enabled the continuation of her scheme resulting in the financial losses to the Short Investors.

#### **B. Second Element of Proof: Material Participation or Aid**

Without question, Marsha Schubert committed securities fraud. It is also beyond dispute that Defendants rendered banking services to Schubert as she did so. The question before the

Court is whether the evidence establishes that the Defendants provided aid to or materially participated in Schubert's fraud.

The methods by which a person can provide assistance to the primary wrongdoer vary from case-to-case for purposes of establishing joint and several liability. Assistance is not defined by any particular act or acts. *Bayhi v. State*, 629 So.2d 782, 789 (Ala. Crim. App. 1993). For secondary liability to attach, however, it is **not** necessary for the defendant to have acted in the offers and sales of the securities or to have made the fraudulent misrepresentations or omissions. *Id.* at 790; *see also U.S. v. Mayo*, 646 F.2d 369, 371 (9<sup>th</sup> Cir. 1981); *U.S. v. Kessi*, 868 F.2d 1097, 1105 (9<sup>th</sup> Cir. 1989); *Kahn v. Chase Manhattan Bank, N.A.*, 760 F.Supp. 369, 374 (S.D.N.Y. 1991). Furthermore, it is **not** necessary for the accused to have knowledge of the misrepresentations, omissions or any other details of the underlying fraud. *Woods v. Barnett Bank of Fort Lauderdale*, 765 F.2d 1004, 1012 (11<sup>th</sup> Cir. 1985). In short, joint and several liability can be derived solely from the unlawful conduct of the seller. *Ainslie v. First Interstate Bank of Oregon, N.A.*, 939 P.2d 125, 137 (Or. Ct. App. 1997).

While the culpable conduct at issue must be "material," all that must be shown is "a substantial causal connection" between the conduct in question and the resulting investment losses. *Mendelsohn v. Capital Underwriters, Inc.*, 490 F. Supp. 1069, 1084 (N.D. Cal. 1979). If the aid "has a natural tendency to influence, or was capable of influencing, the decision of the purchaser", the aid is considered material. *Connecticut National Bank v. Giacomi*, 699 A.2d 101, 122 (Conn. 1997).

There are but a few times that the courts have considered conduct that constitutes aid or material participation in connection with the sale of securities under Oklahoma law. *See Howell v. Ballard*, 1990 OK CIV APP 92, 801 P.2d 127; *Odor v. Rose*, 2008 WL 2557607 (W.D. Okla.

2008). However, the facts of these cases have, by mere coincidence, involved the most basic form of aid or material participation: the direct involvement in the solicitation or negotiation of the securities transaction. The case law of other states becomes relevant in demonstrating the broader range of conduct constituting aid or material participation.<sup>4</sup>

It is an established tenet of statutory construction that statutes, like the securities laws, should be construed broadly to effectuate their remedial purpose. *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). Consequently, courts interpreting state statutes with a provision similar to that in Section 408 of the Predecessor Act have taken a broad view of conduct that may support a finding of joint and several liability. *Klein v. Oppenheimer & Co., Inc.*, 130 P.3d 569, 584 (Kan. 2006). For example, in *Prince v. Brydon*, 764 P.2d 1370 (Or. 1988),<sup>5</sup> an investor who purchased unregistered limited partnership interests sued the partnership's attorney for participating in or materially aiding the sale of the securities. The investor argued that the attorney's role in drafting the limited partnership agreement and the offering documents, including a tax opinion, constituted material aid. The Oregon Supreme Court agreed and opined: "[w]hether one's assistance in the sale is 'material' does not depend on one's knowledge of the facts that make [the sale] unlawful; it depends on the importance of one's personal contribution to the transaction." *Id.* at 1371. The court further explained its findings as to the liability of the attorney by saying:

[t]yping, reproducing, and delivering sales documents may all be essential to a sale, but they could be performed by anyone; it is a drafter's knowledge,

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<sup>4</sup> See Section 501 of the Predecessor Act and Section 1-608 of the Act (general policy is to maximize uniformity in regulation among states); see also, *Mayfield v. H.B. Oil & Gas*, 1987 OK 106, 745 P.2d 732, 736 (Oklahoma Securities Act is to be construed "so as to make uniform the laws of those states which have enacted the Uniform Securities Act").

<sup>5</sup> Oregon, like Oklahoma, adopted the Uniform Securities Act.

judgment, and assertions reflected in the contents of the documents that are “material” to the sale. *Id.* at 1371.<sup>6</sup>

In another Oregon case, the appellate court addressed the issue of participation or material aid in connection with securities sold in violation of a condition of the registration of such securities under state law. *Ainslie v. Spolyar*, 926 P.2d 822 (Or. Ct. App. 1996). The pertinent facts in *Ainslie* involved the escrow of the investment proceeds from the sale of limited partnership interests to be released by the First Interstate Bank of Oregon (FIOR) on receipt of full payment for all of the partnership units. *Id.* at 823-824. The defendant attorney prepared instructions for a transaction between FIOR and The Oregon Bank that nominally resulted in there being the required amount to cause the release of the escrowed monies. *Id.* at 825. The fictitious transaction between the two banks involved paper adjustments to their correspondence accounts and resulted in the release of the funds actually in escrow. *Id.* The defendant attorney was found by the court to have materially aided the unlawful sale of securities based on the extent and importance of his involvement in the fictitious banking transaction. *Id.* at 828.

In a significant companion case to *Ainslie*, the same plaintiffs sued FIOR and Security Pacific Bank Oregon (formerly “The Oregon Bank”). *Ainslie v. First Interstate Bank of Oregon, N.A., et al.*, 939 P.2d 125 (Or. App. 1997) (“*Ainslie II*”). The court determined that liability based on the role of an accused as a participant or provider of material aid “can be derivative from the unlawful activities of the seller or other principals in the sale.” *Id.* at 137. The court, relying on the opinion in *Prince*, reiterated that “liability as a participant or a provider of material aid depends on the extent and importance of the defendant’s involvement.” *Id.* at 137. However, the court in *Ainslie II* further opined that:

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<sup>6</sup> Of additional importance is the court’s declaration that a finding of “material aid” does not depend in any way on the knowledge of the accused. *Id.* at 1372. As will be addressed below, knowledge is relevant only as an affirmative defense under Oklahoma law. Section 408 of the Predecessor Act and Section 1-509 of the Act.

although proof of direct unlawful activity by a defendant or its participation in the seller's unlawful acts themselves, as distinct from the sale generally, is not *essential* to establish its liability as a participant, or material aider, proof of that kind can nevertheless be *relevant* to the question; the extent and importance of the defendant's *involvement* in a sale can be shown by evidence of its connection with unlawful activities as much as with any other aspects of the sale. *Id.* (emphasis in original).

The court concluded that FIOR's connection to the "use and misuse of investor funds" evidenced the fact that FIOR "participated in and materially aided the sale and the unlawful activity itself." *Id.* at 138.

The Iowa Supreme Court in *State v. Diacide Distributors, Inc.*, 561 N.W.2d 369 (Iowa 1997), construed the comparable uniform act provision in that state's code. The defendant was accused of aiding and abetting a Ponzi scheme in which the seller, *inter alia*, represented that the investment proceeds were to be used to purchase insecticide for subsequent distribution. *Id.* at 370. The court went to great lengths to enumerate the activities of Mr. McHose, the accused, to include that: (a) Mr. McHose was aware that the company was selling the investment notes as he was an investor himself; (b) Mr. McHose accepted his interest payments knowing the source of such payments to be the proceeds from the sale of the notes to others; (c) Mr. McHose caused checks to be issued to himself, his associates and/or affiliates that would not have cleared the bank but for the deposit of investors' monies; (d) Mr. McHose caused checks to be issued to earlier investors that would not have cleared the bank but for the deposit of investors' monies; (e) in at least one instance, Mr. McHose deposited money from an investor and on the same day made an interest payment to that investor from the same account; and (f) Mr. McHose did not see funds directed to any insecticide supplier and, therefore, knew that the representations made to investors as to the use of their funds were not true. *Id.* at 379-381. The court, describing the services of Mr. McHose as not otherwise attainable by the wrongdoer, found his activities, over a

two year period, constituted “substantial assistance” to the Ponzi scheme. *Id.* at 383. The court also concluded that the Ponzi scheme would have collapsed long before it did without the aid of Mr. McHose. *Id.*

The federal courts have established a “substantial assistance” standard that is evidenced by a “substantial causal connection between the culpable conduct of the alleged aider and abettor and the harm to the [investor]” or “encouragement or assistance [that] is a substantial factor in causing the resulting tort.” *Metge v. Baehler*, 762 F.2d 621, 624 (8<sup>th</sup> Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986) (citations omitted).<sup>7</sup> This “substantial assistance” standard is comparable to the standard developed by the Oregon court in *Prince*, that is, resolution of the issue of “material aid” depends on the extent and importance of the accused’s involvement in the transaction in question.

### 1. Affirmative acts

As to aiding and abetting by a bank, the basic proposition is that routine or regular banking practices cannot form the basis for liability under the securities laws. Conversely, employing unreasonable or atypical banking practices is a basis for such liability. The case of *Woodward v. Metro Bank of Dallas*, 522 F.2d 84 (5<sup>th</sup> Cir. 1975), is frequently cited for the proposition that banking assistance “constituting the daily grist of the mill” is insufficient to establish joint and several liability. *Woodward* at 97. However, “if the method or transaction is atypical or lacks business justification,” joint and several liability can be imposed. *Id.*

There are multiple cases in which affirmative acts by banks have been interpreted by the federal courts to equate to “substantial assistance” in cases brought under an “aiding and abetting” theory. See *Vendsouth, Inc. v. Arth*, 2003 WL 22399581 (Bkrtcy. M.D.N.C.) at \*18

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<sup>7</sup> Section 501 of the Predecessor Act and Section 1-608 of the Act mandate uniformity in regulation among the states as well as with the related federal regulation. See also *Howell v. Ballard*, 1990 OK CIV APP 92, 801 P.2d 127, 128.

(bank knowingly allowed continuation of a circular movement of funds through acceptance of “on us” checks and granting of provisional credit while receiving benefit of interest charges on uncollected funds); *Lawyers Title Insurance v. United American Bank*, 21 F.Supp. 2d 785, 798-800 (W.D. Tenn. 1998) (bank’s policies and actions, to include allowing overdrafts that were covered with worthless funds and a revolving line of credit to cover shortages in an escrow account, enabled the primary violator to stay in business and perpetuate his fraudulent scheme); and *Neilson v. Union Bank of California, N.A.*, 290 F.Supp. 2d 1101, 1129-1132 (C.D. Cal. 2003) (employee of banking institution vouched for primary wrongdoer and promoted his skills as an investment adviser).

An issue decided in *Vendsouth* was the sufficiency of the evidence to support a claim that the defendant bank substantially assisted and had the requisite knowledge to be liable for aiding and abetting a breach of fiduciary duty. The alleged fraud depended on the continuation of a check kite orchestrated by the debtor in bankruptcy. With respect to the evidence of the bank’s substantial assistance, the court emphasized (a) that the bank’s internal account reports indicated possible fraudulent activities, to include a potential check kite, and (b) that the bank actually benefitted from the continuation of the debtor’s fraud by charging fees equal to “prime plus 3%” for the use of the uncollected funds. In addition, the court concluded that had the bank refused to accept the “on us” checks and stopped the granting of provisional credit to the debtor, the fraud and breach of fiduciary duty would have ended.<sup>8</sup> *Vendsouth* at \*18.

Cases brought under state law are of similar precedential value. For example, in *Judson v. Peoples Bank and Trust Co.*, 134 A.2d 761 (N.J. 1957), former stockholders claimed they were fraudulently induced to sell their shares of stock in a company through misrepresentations

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<sup>8</sup> The *Vendsouth* court’s opinion as to the knowledge factor for the aiding and abetting claim will be discussed by Plaintiff below in Section II.

made by the company's president. As a result of the subsequent sale, the president became the beneficial owner of the company. Corporate funds received from the defendant bank through a loan collateralized by the company's inventory were used by the president to purchase the stock. The court found that the bank participated in the fraudulent scheme by knowingly funding the corporate assets to be used for the personal benefit of the president to defraud the selling stockholders. *Id.* at 767-768. *See also Kelly v. Central Bank & Trust Co. of Denver*, 794 P.2d 1037, 1044 (Colo. App. 1990) (bank's failure to follow reasonable banking practices, *i.e.*, to make inquiry as to the reason and authority for the deposit of a check endorsed by a corporate payee into a third person's account before accepting the check for deposit, was deemed to be evidence of substantial assistance in a scheme to defraud); *Grace v. Corn Exchange Bank Trust Co.*, 38 N.E.2d 449, 453 (N.Y. 1941) (bank that knowingly accepted loan payment made by borrower with monies not belonging to him was participant in borrower's wrongdoing).

The court in *Exchange State Bank v. Kansas Bankers Sur. Co.*, 177 P.3d 1284 (Kan. Ct. App. 2008), determined that Exchange Bank officials acted outside normal banking practice when they routinely and consciously decided to honor checks drawn on uncollected funds, thereby continually extending credit to the accountholder over a period of many months. *Id.* at 1290. The court was charged with determining whether the bank's losses from a check-kiting scheme were excluded from insurance coverage. The insurance policy at issue specifically excluded coverage "for any loss which is the result of the willful extension of credit by the Insured through the payment of checks drawn on uncollected funds." *Id.* at 1285.

The pertinent facts in *Exchange Bank* included, *inter alia*, the following: (1) for a period of several months, the bank president directly handled the account at issue and authorized payment of insufficient checks and imposition of a fee against the account; (2) the account at

issue continuously appeared on the bank's overdraft report for almost four years; (3) uncollected funds reached a high of \$66,578 in 2002, \$165,974 in 2003, and \$373,575 in 2004; and (4) uncollected funds were in excess of \$300,000 six times in 2004 and three times in August of 2004. *Id.* at 1286-1287.

The court found that the bank's payment of checks drawn on uncollected funds by its customer was the result of "conscious decision-making" and constituted the "willful" extension of credit. *Id.* at 1289. The *Exchange Bank* court stated:

a willful extension of credit necessarily involves some conscious decision to lend money and take on some credit risk. The **normal banking practice** of allowing expedited funds availability is not done for the purpose of extending credit. It is done to accommodate the needs of customers, to comply with federal policy on availability of funds, and to expedite check processing given the relatively small percentage of returned checks. The mere practice of allowing bank customers **generally** to use uncollected funds would not constitute the willful extension of credit under the policy. *Id.* at 1288. (Emphasis added.)

It was the conclusion of the court, however, that the actions of Exchange Bank were "more knowing and purposeful." *Id.* Like the actions of Exchange Bank, the actions of the Defendants herein were atypical, more knowing and more purposeful.

## 2. Silence and inaction

With the exception of a footnote in *Waugh v. Heidler*, 1977 OK 78, 564 P.2d 218, there is no Oklahoma case law addressing the issue of whether silence and/or inaction by the accused can amount to substantial assistance. *Id.* at 221, n. 2. Although not applied to the facts in *Waugh*, a case addressing Section 408 of the Predecessor Act, the Oklahoma Supreme Court recognized that silence or inaction may justify the imposition of joint and several liability. *Id.* Likewise, silence and/or inaction has proven sufficient to establish substantial assistance under other states' laws. For example, in *Cagan v. West Suburban Bank*, 1992 WL 80966 (N.D. Ill.), the plaintiffs alleged that the defendant bank aided the perpetuation of a Ponzi scheme by making over 20

loans totaling \$5.8 million to the primary wrongdoers. *Id.* at \*1. The loan proceeds were used to pay interest and principal to earlier investors until new investors could be enticed into the scheme. *Id.* When the bank learned of the underlying fraud, it chose to remain silent and protect its own financial interest. *Id.* The court concluded that the injury to investors by the bank was caused by its facilitation of the investments and that its silence facilitated the investors' losses - particularly, the losses of the later investors. *Id.* at \*6.

The issue of inaction was also addressed by the *Diacide* court. The experience of Mr. McHose as a banker for over twenty years formed the foundation of the court's opinion as to his substantial assistance to and knowledge of the fraudulent sale of the investment notes at issue. *Diacide* at 382. The court declared:

[a]lthough there may be no duty to disclose and there is only inaction on the part of the aider and abettor, liability under the substantial assistance test may still result in a securities law setting. Thus, inaction "may provide a predicate for liability where the plaintiff demonstrates that the aider-abettor consciously intended to assist in the perpetration of the wrongful act." *Id.* at 383 (citations omitted).

Not only did the court find there to be sufficient evidence to show the assistance of Mr. Hose to be a substantial factor in causing the securities fraud, but that Mr. McHose "consciously intended to assist in the perpetuation of a fraudulent scheme." *Id.* at 384.

Participation in the daily loan committee meetings provided Defendants with access to all "Large Item" transactions effected through the Schubert F&M Account. The Defendants' involvement in Schubert's check kite clearly evidences their connection to the use and misuse of investor funds and to the fraudulent sales of securities by Schubert.

## **II. KNOWLEDGE: THE AFFIRMATIVE DEFENSE**

With no Oklahoma cases addressing the knowledge factor as an affirmative defense, the holding of the Oregon court in *Prince v. Brydon* again provides guidance. The Oregon court in

*Prince v. Brydon* stressed that knowledge is relevant only as an affirmative defense noting that the drafters of the Oregon securities statutes “took pains to make clear that the relevant knowledge is of ‘the existence of the facts,’ not of the unlawfulness of a sale.” *Id.* at 1372. Although the provision may appear to impose a heavy burden on the accused who is attempting to exonerate himself, the legislature’s choice of language was deliberate. *Id.* Knowledge of the “existence of the facts” was the relevant factor deliberately chosen by the Oklahoma Legislature in establishing the affirmative defense under this state’s securities laws. Section 408(b) of the Predecessor Act and Section 1-509 of the Act.

While knowledge is pertinent only as an affirmative defense under Oklahoma securities statutes, the knowledge of the accused is an element of proof for a plaintiff under federal law. *Woodward* at 94-95.<sup>9</sup> As the test for determining the liability of an alleged aider and abettor has evolved, the federal courts have concluded that the “substantial assistance” and “knowledge” elements should be considered in relation to each other and not in isolation. *Metge*, at 624; *SEC v. Nacchio*, 2009 WL 690306 (D. Colo.) at \*7. Specifically, “the more acute a party’s knowledge of the ongoing fraudulent scheme, the less substantial the acts constituting substantial assistance need be, and *vice-versa*.” *Id.*

When evaluating the knowledge of the defendant in *Diacide*, the court incorporated a similar test:

[a] party who engages in atypical business transactions or actions which lack business justification may be found liable as an aider and abettor with a minimal showing of knowledge. Conversely, a party whose actions are routine and part of normal everyday business practices would need a higher degree of knowledge for liability as an aider and abettor to attach.

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<sup>9</sup> See *Day v. Southwest Mineral Energy, Inc.*, 617 P.2d 1334, 1339 (Okla. 1980) (Oklahoma Supreme Court adopted the interpretative history of the federal securities laws when interpreting the securities statutes of this state).

*Diacide* at 378, citing *Camp v. Dema*, 948 F.2d 455, 459 (8<sup>th</sup> Cir. 1991). The court's conclusions as to knowledge were two-fold: Mr. McHose was aware that the atypical business transactions involved a Ponzi scheme and he was aware of his role in furthering the fraudulent scheme. *Id.* at 378-382.

The *Diacide* court described the evidence on which it relied to establish the knowledge of the defendant as "circumstantial" but "persuasive and largely undenied." *Id.* at 381-382. As stated by the *Woodward* court, "knowledge" of the existence of a securities violation by the accused aider and abettor must usually be inferred; knowledge does not have to be proven by direct evidence but may be proven by circumstantial evidence based on the facts submitted. *Woodward* at 95-97.

A determination that the requisite knowledge by the defendant bank to support the aiding and abetting claim in *Vendsouth, Inc. v. Arth* was also based largely on circumstantial evidence: the number of checks drawn on uncollected funds, the fact that the check kite extended over a period of seventeen (17) months, and the size and nature of the checks deposited. *Id.* at 17. Specifically, the "on us" checks were 1,250 in number and totaled \$106,000,000 in amount; the checks were deposited on nearly a daily basis; many of the checks were for amounts greater than \$100,000 and some were for amounts greater than \$200,000; the deposited checks were not remittances from customers; and there were almost continuous negative uncollected balances in the debtor's account. *Id.* The court ultimately concluded as to the aiding and abetting claim that:

[t]aken together, [the bank's] knowledge of the "on us" deposits combined with the benefits to the bank by the continuation of the fraud and the fact that but for the continued acceptance of the "on us" checks and granting of provisional credit, the check kite could not have continued, the plaintiff has put forth evidence of sufficient facts to defeat [the bank's] motion for summary judgment. *Id.* at \*18.

Except as to degree, the critical facts cited above by the *Vendsouth* court parallel the uncontroverted facts in the case at hand. While the Defendants' conduct here is much more egregious, the result is still the same. Like the defendants in *Diacide* and *Vendsouth*, the Defendants materially aided Schubert's securities fraud by consciously deciding to allow Schubert to operate a massive, illegal check kite over a period of many months, while financially benefiting from the receipt of fees and interest charges.

### CONCLUSION

The genesis of this entire matter is the fraudulent investment scheme orchestrated and perpetuated by Marsha Schubert over the course of almost five years. A preponderance of the evidence shows that Schubert made material misrepresentations and omissions to investors in connection with the sale of securities, which she was able to hide through the payment of fictitious investment profits. The continual payments of investment profits created the appearance of legitimacy and success that enabled Schubert to continue her fraudulent activities for as long as she did. Schubert made the payments of fictitious profits by issuing checks drawn on uncollected funds and relying on the float created by a check kite. With knowledge of the activity in and through the Schubert F&M Account, including the transactions involving Berry, Mathews and Wilcox, Defendants allowed a Ponzi scheme and a check kite to perpetuate over the years.

The summation of the bank's activity in *Connecticut National Bank v. Giacomi*, 699 A.2d 101 (Conn. 1995), is extremely apropos here. The court said:

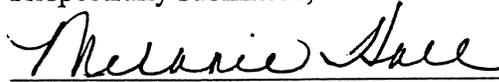
The banking activity established by the evidence in this case, however, cannot by even the most generous stretch of the imagination be described as normal everyday business practices. Rather, the banking practices here were atypical in the extreme. No one who has ever dealt with a bank . . . can review the catalogue of [the bank's] acts in this case without shaking his head in wonder. *Id.* at 123.

Defendants provided aid or materially participated in Marsha Schubert's fraudulent activities and are jointly and severally liable to the same extent as Marsha Schubert pursuant to Section 408 of the Predecessor Act and Section 1-509 of the Act. The facts stated herein and evidentiary materials attached hereto establish that no genuine issue of material fact exists regarding the Plaintiff's cause of action, and as such, Plaintiff is entitled to summary judgment against Defendants. Further, Plaintiff is entitled to summary judgment as a matter of law.

Plaintiff requests remedies in the form of an injunction, civil penalties in the amount of \$15,000 per Defendant, and restitution. Injunctive relief is appropriate where, as here, Defendants' conduct was ongoing over a period of several years and Defendants' business presents the opportunity for future violations. *SEC v. Better Life Club of America*, 995 F.Supp 167, 178 (D.D.C. 1998). Defendants' repeated aid to and/or participation with Schubert over the years warrants civil penalties for their part in aiding the fraud. Section 406.1 of the Predecessor Act and Section 1-603(B)(2)(c) of the Act.

Restitution to redress fraud is designed to make the victims whole. *Better Life Club of America* at 179-180. The Defendants are jointly and severally liable with and to the same extent as Schubert pursuant to Section 408(b) of the Predecessor Act and Section 1-509(G) of the Act and may be held responsible for the entire loss. *SEC v. Absolutefuture.com*, 393 F.3d 94 (2nd Cir. 2004). Investor losses caused by the actions of Schubert and Defendants were in excess of \$9,000,000. Recognizing that Plaintiff is entitled to only one satisfaction of the amount jointly and severally owed, and acknowledging that the Short Investors have already covered some of their losses through third-party recoveries or through receivership distributions, Plaintiff requests an order of restitution finding Defendants jointly and severally liable with and to the same extent as Marsha Schubert for the remaining loss of \$3,558,026.56.

Respectfully submitted,



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Amanda Cornmesser, OBA #20044

Oklahoma Department of Securities

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Oklahoma City, OK 73120

Attorneys for Plaintiff, Oklahoma

## CERTIFICATE OF MAILING

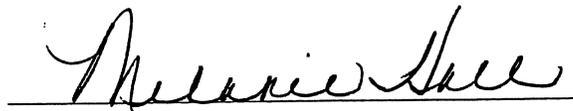
I hereby certify that a true and correct copy of the *Plaintiff's motion for Summary Judgment*, was mailed this 8th day of May, 2009, by depositing it in the U.S. Mails, postage prepaid, to the following counsel of record:

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A handwritten signature in cursive script, appearing to read "Ann L. Hoover", is written over a horizontal line.

IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA

OKLAHOMA DEPARTMENT OF SECURITIES )  
*ex rel.* Irving L. Faught, Administrator, )

Plaintiff, )

vs. )

Case No. CJ-2006-3311  
Honorable Patricia G. Parrish

FARMERS & MERCHANTS BANK, )  
an Oklahoma banking entity; )  
FARMERS & MERCHANTS BANCSHARES, )  
INC., an Oklahoma corporation; )  
JOHN V. ANDERSON, Individually, as an officer )  
and director of Farmers & Merchants Bank, and )  
as a shareholder of Farmers & Merchants )  
Bancshares, Inc.; and JOHN TOM ANDERSON, )  
Individually, as an officer and director of )  
Farmers & Merchants Bank, and as a shareholder )  
of Farmers & Merchants Bancshares, Inc., )

Defendants. )

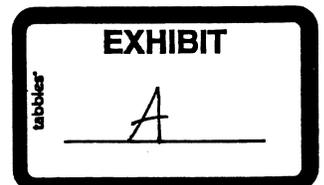
FILED IN THE DISTRICT COURT  
OKLAHOMA COUNTY, OKLA.

NOV 13 2006

PATRICIA PRESLEY, COURT CLERK  
by \_\_\_\_\_ DEPUTY

ANSWER

COME NOW Defendants Farmers & Merchants Bank (a state chartered Oklahoma banking entity), Farmers & Merchants Bancshares, Inc., John V. Anderson (individually and as an officer and director of Farmers & Merchants Bank), and John Tom Anderson (individually and as an officer and director of Farmers & Merchants Bank)(collectively referred to as "Defendants"), and answer Plaintiff's Petition. Except as specifically admitted below, Defendants deny each and every allegation of the Petition and demand strict proof thereof.



## **DEFENDANTS**

1. Defendants admit that Farmers & Merchants Bank is a state chartered bank located in Crescent, Oklahoma. Farmers & Merchants Bank also has a bank located in Guthrie, Oklahoma. Defendants further admit that Farmers & Merchants Bank has a contractual relationship with Investment Centers of America, Inc., which has offices at Farmers & Merchant Bank's Crescent and Guthrie banking locations. Don Spicer works as an employee of Investment Centers of America and Farmers & Merchants Bank. To the extent that the allegations in paragraph 1 of the Petition are inconsistent with these admissions, they are denied.

2. Defendants deny the allegations in paragraph 2 of the Petition. Farmers & Merchants Bancshares is the holding company for F&M Bank, N.A.

3. Defendants admit the allegations in paragraph 3 of the Petition.

4. Defendants admit the allegations in paragraph 4 of the Petition.

5. Defendants admit the allegations in paragraph 5 of the Petition.

## **OVERVIEW**

6. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 6 of the Petition.

7. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 7 of the Petition.

8. Defendants admit that Marsha Schubert was an authorized signer on account number 34-7477 and account number 35-9424. To the extent that the allegations in paragraph 8 of the Petition are inconsistent with these admissions, they are denied.

9. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 9 of the Petition.

10. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 10 of the Petition. Defendants specifically deny that it knew and, in the exercise of reasonable care could not have known, of any securities fraud scheme perpetrated by Marsha Schubert. Defendants further deny that it materially aided or participated in any securities fraud scheme of Marsha Schubert.

11. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 11 of the Petition. Defendants specifically deny that it knew and, in the exercise of reasonable care could not have known, of any securities fraud scheme perpetrated by Marsha Schubert. Defendants further deny that it materially aided or participated in any securities fraud scheme of Marsha Schubert.

12. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 12 of the Petition.

#### ***The Securities Fraud***

13. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 13 of the Petition.

14. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 14 of the Petition.

15. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 15 of the Petition.

#### ***Defendants' Assistance in Securities Fraud***

16. Defendants deny the allegations in paragraph 16 of the Petition.

17. Paragraph 17 of the Petition states no claim against Defendants and therefore does not require a response from Defendants. To the extent that paragraph 17 states a claim against Defendants, it is denied.

18. Defendants deny the allegations in paragraph 18 of the Petition.

19. Defendants deny the allegations in paragraph 19 of the Petition.

#### **JURISDICTION AND VENUE**

20. Defendants deny the allegations in paragraph 20 of the Petition and adopt and incorporate, as if fully set forth herein, the arguments and authorities asserted in its previously filed Motion to Dismiss.

21. Defendants deny the allegations in paragraph 21 of the Petition.

#### **Non-Defendants Associated with DEFENDANTS Bank**

22. Defendants admit the allegations in the first and second sentences of paragraph 22 of the Petition. Defendants further admit that Ed Stanton was Farmers & Merchants Bank's compliance officer, beginning January 12, 1996, and was designated as the Bank Secrecy Act officer in January 1999. Defendants admit that Ed Stanton resigned his position at Farmers & Merchants Bank, effective March 31, 2004. To the extent that the allegations in paragraph 22 of the Petition are inconsistent with these admissions, they are denied.

23. Defendants admit the allegations in the first, second, and third sentences of paragraph 23 of the Petition. Defendants deny that Chad Johnson was the assigned loan officer for Marsha Schubert.

24. Defendants admit the allegations in the first and second sentences of paragraph 24 of the Petition. Defendants state that Justin Tarrant advised Farmers & Merchants Bank

in January 2004 that he was resigning, effective February 15, 2004. To the extent that the allegations in paragraph 24 are inconsistent with these admissions and statements, they are denied.

25. Defendants admit the allegations in paragraph 25 of the Petition, with the qualification that Beth Armer is employed by Farmers & Merchants Bank as a part-time teller.

26. Defendants admit that, beginning in January 2002, the loan committee at Farmers & Merchants Bank was comprised of John V. Anderson, John Tom Anderson, Ed Stanton, Justin Tarrant, and Chad Johnson. Defendants further admit that John V. Anderson, John Tom Anderson, and Chad Johnson remained on the loan committee after the resignations of Ed Stanton and Justin Tarrant in 2004. To the extent that the allegations in paragraph 26 are inconsistent with these admissions, they are denied.

27. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 27 of the Petition.

28. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 28 of the Petition.

29. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 29 of the Petition.

30. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 30 of the Petition.

31. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 31 of the Petition.

32. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 32 of the Petition.

### **FACTUAL ALLEGATIONS**

33. In response to paragraph 33 of the Petition, Defendants incorporate and reallege their prior responses to paragraphs 1 through 32 of the Petition.

#### **History of Schubert F&M Account**

34. To the extent that the allegations contained in paragraph 34 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

35. To the extent that the allegations contained in paragraph 35 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

36. To the extent that the allegations contained in paragraph 36 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

37. To the extent that the allegations contained in paragraph 37 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

38. To the extent that the allegations contained in paragraph 38 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

39. To the extent that the allegations contained in paragraph 39 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

**The "Ponzi" Scheme**

40. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 40 of the Petition.

41. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 41 of the Petition.

**The Beginning of the "Ponzi" Scheme**

42. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 42 of the Petition.

43. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 43 of the Petition.

44. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 44 of the Petition.

45. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 45 of the Petition.

46. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 46 of the Petition.

47. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 47 of the Petition.

48. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 48 of the Petition.

49. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 49 of the Petition.

50. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 50 of the Petition.

51. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 51 of the Petition.

#### **The Continuation of the "Ponzi" Scheme**

52. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 52 of the Petition.

53. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 53 of the Petition.

54. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 54 of the Petition.

55. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 55 of the Petition.

56. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 56 of the Petition.

57. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 57 of the Petition.

58. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 58 of the Petition.

59. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 59 of the Petition. Moreover, to the extent that

the allegations contained in paragraph 59 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

60. To the extent that the allegations contained in paragraph 60 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

61. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 61 of the Petition. Moreover, to the extent that the allegations contained in paragraph 61 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

62. To the extent that the allegations contained in paragraph 62 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

63. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 63 of the Petition.

64. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 64 of the Petition.

65. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 65 of the Petition.

**The Check Exchange Scheme**

66. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 66 of the Petition.

67. Defendants admit that Robert Mathews opened an account at Farmers & Merchants Bank on November 10, 2003. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 67 of the Petition.

68. Defendants admit that Farmers & Merchants Bank has made secured loans to Robert Mathews. To the extent that the allegations in paragraph 68 are inconsistent with this admission, they are denied.

69. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 69 of the Petition.

70. Defendants admit that Marvin Wilcox opened an account at Farmers & Merchants Bank on November 10, 2003. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 70 of the Petition.

71. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 71 of the Petition.

72. Defendants admit that Marvin Wilcox opened an account at Farmers & Merchants Bank on November 12, 2003. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 72 of the Petition.

73. Defendants deny the allegations in paragraph 73 of the Petition.

**Bob Mathews**

74. To the extent that the allegations contained in paragraph 74 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

75. To the extent that the allegations contained in paragraph 75 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

76. To the extent that the allegations contained in paragraph 76 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

77. To the extent that the allegations contained in paragraph 77 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

78. To the extent that the allegations contained in paragraph 78 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

79. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 79 of the Petition.

**Marvin Wilcox**

80. To the extent that the allegations contained in paragraph 80 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

81. To the extent that the allegations contained in paragraph 81 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

82. To the extent that the allegations contained in paragraph 82 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

83. To the extent that the allegations contained in paragraph 83 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

84. To the extent that the allegations contained in paragraph 84 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

85. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 85 of the Petition.

**Lance Berry**

86. To the extent that the allegations contained in paragraph 86 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

87. To the extent that the allegations contained in paragraph 87 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

88. To the extent that the allegations contained in paragraph 88 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

89. To the extent that the allegations contained in paragraph 89 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

90. To the extent that the allegations contained in paragraph 90 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

91. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 91 of the Petition.

**F&M Bank's Conduct**

92. Defendants deny the allegations in paragraph 92 of the Petition.

93. Defendants admit that Farmers & Merchants Bank's standard procedure was for the Loan Committee to meet each business and review the bank's business from the previous banking day. This review includes new requests for loans, renewed loans, extensions or deferrals of loans, overdrafts, and "large items." During the relevant time period, it did not include a review of accounts with uncollected balances. To the extent that the allegations of paragraph 93 are inconsistent with these admissions, they are denied.

94. Defendants define "large item" as any deposit or check in an amount greater than \$2,500. To the extent that the allegations of paragraph 94 are inconsistent with this statement, they are denied.

95. Defendants admit that all outgoing wire transfers require the prior approval of a loan officer, up to the loan officer's specified limit. To the extent that the allegations of paragraph 95 are inconsistent with this admission, they are denied.

96. Defendants deny the allegations in paragraph 96 of the Petition.

*F&M Bank's Knowledge and Assistance*

97. Defendants deny the allegations in paragraph 97 of the Petition.

98. Defendants deny the allegations in paragraph 98 of the Petition.

**A. Volume of Activity**

99. To the extent that the allegations contained in paragraph 99 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

100. To the extent that the allegations contained in paragraph 100 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

101. To the extent that the allegations contained in paragraph 101 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

102. To the extent that the allegations contained in paragraph 102 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

103. To the extent that the allegations contained in paragraph 103 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

104. To the extent that the allegations contained in paragraph 104 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

105. To the extent that the allegations contained in paragraph 105 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied. 106. To the extent that the allegations contained in paragraph 106 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

107. Defendants deny the allegations in paragraph 107 of the Petition.

**B. Uncollected Funds**

108. Defendants deny the allegations in paragraph 108 of the Petition.

109. Defendants deny the allegations in paragraph 109 of the Petition.

110. Defendants admit that Marsha Schubert's uncollected balances were discussed by members of the loan committee, beginning in the fall of 2002. To the extent that the allegations in paragraph 110 are inconsistent with this admission, they are denied.

111. Defendants deny the allegations in paragraph 111 of the Petition.

112. Defendants deny the allegations in paragraph 112 of the Petition.

113. Defendants deny the allegations in paragraph 113 of the Petition.

114. Defendants deny the allegations in paragraph 114 of the Petition.

115. Defendants admit that, at some point, it changed the service charge method for account number 34-7477. To the extent that the allegations of paragraph 115 are inconsistent with this admission, they are denied.

116. To the extent that the allegations contained in paragraph 116 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

117. Defendants deny the allegations in paragraph 117 of the Petition.

**C. Management's Knowledge of Check Exchange Scheme**

118. Defendants deny the allegations in paragraph 118 of the Petition.

**Activity Between F&M and NB&C Accounts**

119. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 119 of the Petition.

120. To the extent that the allegations contained in paragraph 120 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

121. Defendants admit that John Tom Anderson spoke with Dennis Themer during the relevant period. However, Defendants deny the remaining allegations in paragraph 121 of the Petition.

122. Defendants admit that John Tom Anderson spoke on one occasion with Jim Talkington. However, Defendants deny the remaining allegations in paragraph 122 of the Petition.

123. Defendants deny the allegations in paragraph 123 of the Petition.

**Activity Between F&M Bank Accounts**

124. Defendants deny the allegations in paragraph 124 of the Petition.

125. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 125 of the Petition.

126. Defendants deny the allegations in paragraph 126 of the Petition.
127. Defendants deny the allegations in paragraph 127 of the Petition.
128. Defendants deny the allegations in paragraph 128 of the Petition.
129. Defendants deny the allegations in paragraph 129 of the Petition.
130. Defendants deny the allegations in paragraph 130 of the Petition.
131. Defendants deny the allegations in paragraph 131 of the Petition.
132. Defendants deny the allegations in paragraph 132 of the Petition.
133. Defendants deny the allegations in paragraph 133 of the Petition.
134. Defendants deny the allegations in paragraph 134 of the Petition.
135. Defendants deny the allegations in paragraph 135 of the Petition.
136. Defendants deny the allegations in paragraph 136 of the Petition.
137. Defendants deny the allegations in paragraph 137 of the Petition.
138. To the extent that the allegations contained in paragraph 138 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

139. Defendants deny the allegations in paragraph 139 of the Petition.

**D. Use of Investment Proceeds**

140. Defendants deny the allegations in paragraph 140 of the Petition.

141. Defendants deny the allegations in paragraph 141 of the Petition.

142. To the extent that the allegations contained in paragraph 142 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

143. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 143 of the Petition. Additionally, to the extent that the allegations contained in paragraph 143 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

144. Defendants deny the allegations in paragraph 144 of the Petition.

145. Defendants deny the allegations in paragraph 145 of the Petition.

146. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 146 of the Petition.

147. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 147 of the Petition.

148. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 148 of the Petition.

149. Defendants deny the allegations in paragraph 149 of the Petition.

150. Defendants deny the allegations in paragraph 150 of the Petition.

151. Defendants deny the allegations in paragraph 151 of the Petition.

152. Defendants deny the allegations in paragraph 152 of the Petition.

**E. Unauthorized Activity**

153. Defendants admit the allegations in paragraph 153 of the Petition.

154. Defendants deny the allegations in paragraph 154 of the Petition.

155. Defendants deny the allegations in paragraph 155 of the Petition.

156. Defendants deny the allegations in paragraph 156 of the Petition.

157. Defendants deny the allegations in paragraph 157 of the Petition. Additionally, to the extent that the allegations contained in paragraph 157 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

158. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 158 of the Petition. Additionally, to the extent that the allegations contained in paragraph 158 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

159. Defendants deny the allegations in paragraph 159 of the Petition.

160. Defendants deny the allegations in paragraph 160 of the Petition.

161. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 161 of the Petition.

162. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 162 of the Petition.

163. Defendants deny the allegations in paragraph 163 of the Petition.

**F. Lending Activity**

164. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 164 of the Petition. Additionally, to the extent that the allegations contained in paragraph 164 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

165. Defendants deny the allegations in paragraph 165 of the Petition.

166. Defendants deny the allegations in paragraph 166 of the Petition.

167. Defendants admit that when a borrower purchases cattle under private treaty, typically no proof of sale is provided to the purchaser by the seller. To the extent that the allegations of paragraph 167 are inconsistent with this admission, they are denied.

168. Defendants deny the allegations in paragraph 168 of the Petition.

169. Defendants deny the allegations in paragraph 169 of the Petition.

170. Defendants deny the allegations in paragraph 170 of the Petition.

**G. Other Commingling of Funds**

171. Defendants deny the allegations in paragraph 171 of the Petition.

172. To the extent that the allegations contained in paragraph 172 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

173. To the extent that the allegations contained in paragraph 173 of the Petition interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.

174. Defendants deny the allegations in paragraph 174 of the Petition.

175. Defendants deny the allegations in paragraph 175 of the Petition.

176. Defendants deny the allegations in paragraph 176 of the Petition.

177. Defendants deny the allegations in paragraph 177 of the Petition.

**H. Monitoring of Brokerage Activities**

178. Defendants admit the allegations in paragraph 178 of the Petition.

179. Defendants admit the allegations in paragraph 179 of the Petition.

180. Defendants admit the allegations in paragraph 180 of the Petition.

181. Defendants admit the allegations in paragraph 181 of the Petition.

182. Defendants admit the allegations in paragraph 182 of the Petition.

183. To the extent that the allegations contained in paragraph 183 of the Petition interpret written documents, the documents speak for themselves and any allegations contrary therewith are denied.

184. To the extent that the allegations contained in paragraph 184 of the Petition interpret written documents, the documents speak for themselves and any allegations contrary therewith are denied. Defendants specifically deny the second sentence in paragraph 184 of the Petition.

185. To the extent that the allegations contained in paragraph 185 of the Petition interpret written documents, the documents speak for themselves and any allegations contrary therewith are denied.

186. Defendants deny the allegations in paragraph 186 of the Petition.

187. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 187 of the Petition.

188. Defendants deny the allegations in paragraph 188 of the Petition.

#### **I. Conflicts of Interest**

189. To the extent that the allegations contained in paragraph 189 of the Petition interpret written documents, the documents speak for themselves and any allegations contrary therewith are denied.

190. To the extent that the allegations contained in paragraph 190 of the Petition interpret written documents, the documents speak for themselves and any allegations contrary therewith are denied.

191. Defendants admit that Ed Stanton was designated as Farmers & Merchants Bank's compliance officer in January 1996. Stanton oversaw compliance with all policies of the bank, not just the bribery policy. To the extent the allegations in paragraph 91 are inconsistent with these admissions, they are denied.

192. Defendants deny the allegations in paragraph 192 of the Petition.

**Ed Stanton**

193. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 193 of the Petition.

194. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 194 of the Petition.

195. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 195 of the Petition.

196. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 196 of the Petition.

197. Defendants deny the allegations in paragraph 197 of the Petition.

198. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 198 of the Petition.

199. Defendants deny the allegations in paragraph 199 of the Petition.

200. Defendants deny the allegations in paragraph 200 of the Petition.

**Justin Tarrant**

201. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 201 of the Petition.

202. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 202 of the Petition.

203. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 203 of the Petition.

204. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 204 of the Petition.

205. To the extent that the allegations contained in paragraph 205 of the Petition interpret written documents, the documents speak for themselves and any allegations contrary therewith are denied.

206. Defendants deny the allegations in paragraph 206 of the Petition.

207. Defendants deny the allegations in paragraph 207 of the Petition.

**Chad Johnson**

208. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 208 of the Petition.

209. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 209 of the Petition.

210. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 210 of the Petition.

211. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 211 of the Petition.

212. Defendants deny the allegations in paragraph 212 of the Petition.

213. Defendants deny the allegations in paragraph 213 of the Petition.

**J. Bank Consultant's Opinion**

214. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 214 of the Petition.

215. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 215 of the Petition.

**K. Assistance to Bank Customers**

216. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 216 of the Petition.

217. Defendants deny the allegations in paragraph 217 of the Petition.

218. To the extent that the allegations contained in paragraph 218 of the Petition interpret the bank records of Marsha Schubert and/or Richard Hedrick, the documents speak for themselves and any allegations contrary therewith are denied.

219. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 219 of the Petition.

220. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 220 of the Petition.

221. Defendants deny the allegations in paragraph 221 of the Petition.

**CAUSE OF ACTION**

**AIDING AND ABETTING SECURITIES FRAUD**

222. Defendants deny all unnumbered allegations contained under the subheading "AIDING AND ABETTING SECURITIES FRAUD," and demands strict proof thereof.

### DEFENSES/AFFIRMATIVE DEFENSES

1. The Petition, in whole or in part, fails to state a claim upon which relief can be granted. Defendants adopt and incorporate, as if fully set forth herein, its Motion to Dismiss previously filed seeking dismissal of Plaintiff's claims under 12 O.S. 2012.
2. The Petition fails to join necessary and/or indispensable parties in whose absence complete relief cannot be accorded among those already parties. Therefore, this action must be dismissed, or alternatively, the action should be stayed pending other appropriate relief by the Court.
3. Plaintiff lacks standing to bring this lawsuit.
4. Defendants cannot be held jointly and severally liable for the acts or omissions of Marsha Schubert.
4. Plaintiff's claims are barred in whole or in part by the actions or omissions of Marsha Schubert's employers or entities on behalf of which Marsha Schubert acted as an agent or contractor.
5. Plaintiff's claims are barred in whole or in part by the applicable statutes of limitations.
6. Plaintiff's claims are barred in whole or in part by the doctrine of respondeat superior.
7. Plaintiff's claims are barred in whole or in part by its failure to meet and/or comply with all conditions precedent under Oklahoma law prior to maintaining an action in the district court.

8. Plaintiff's claims are subject to all defenses that Defendants may assert against those who purportedly invested with Marsha Schubert, to include, but not limited to, assumption of risk, comparative fault, ratification, unclean hands, and lack of due diligence in monitoring, managing, and handling their investments.
9. Plaintiff's claims are barred in whole or in part by failure of consideration.
10. Plaintiff's claims are barred in whole or in part by the doctrine of laches.
11. Plaintiff's claims are barred in whole or in part by the doctrine of waiver.
12. Plaintiff's claims are barred in whole or in part by the doctrine of payment.
13. Plaintiff's claims are barred in whole or in part by the doctrine of accord and satisfaction.
14. Plaintiff's claims are barred in whole or in part by the doctrine of release.
15. Plaintiff's claims, including, but not limited to, its request for restitution, are barred in whole or in part by the doctrine of estoppel.
16. Plaintiff's claims are barred in whole or in part by the doctrine of res judicata.
17. Plaintiff's claims are barred in whole or in part by the doctrine of arbitration and award.
18. Plaintiff's claims are barred in whole or in part by the doctrine of misjoinder.
19. Plaintiff's claims are barred in whole or in part by the negligence of third parties over whom Defendants had no control and for whom Defendants are not legally responsible in that the failure of said third parties to exercise ordinary care proximately caused in whole or in part the relief requested by Plaintiff.

20. Plaintiff's claims are barred in whole or in part by the comparative negligence or fault of third parties.

21. Plaintiff's claims are barred in whole or in part by failure to mitigate damages.

22. In the unlikely event that Defendants are held liable in this case, which is not admitted and is expressly denied, Defendants assert its rights of contribution, comparative fault, indemnity, and/or credits or offsets as permitted by applicable law.

23. Plaintiff's claims are barred in whole or in part by the rule against double recovery.

24. Defendants are entitled to a setoff or credit for any amounts received by Plaintiff and/or the court-appointed receiver from any source whatsoever with respect to any recovery arising out of claims and/or allegations asserted herein against any other person or party. Such would include but not be limited to any settlement and/or compromise and/or any damages paid as a result of bankruptcy, arbitration, and/or other litigation.

25. Defendants deny that it materially aided, or is about to materially aid an act, practice, or course of business constituting a violation of the Oklahoma Securities Act, or a rule adopted or order issued under the Oklahoma Securities Act or constituting a dishonest or unethical practice.

26. Defendants did not materially aid and/or participate in any securities violation committed by Marsha Schubert. Defendants did not participate in the solicitation, negotiation, and/or disposition stages of any securities transaction between Marsha Schubert and any alleged investor, which led to his/her investment with Marsha Schubert.

Further, Defendants did not know and, in the exercise of reasonable care could not have known, of the purported securities violations committed by Marsha Schubert.

27. Defendants deny any misconduct in connection with the offer, purchase, or sale of securities. Defendants deny that it made any untrue statements of material fact or omitted to state a material fact necessary in order to make a statement made not misleading. Defendants further deny that it engaged in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.

28. Activities that occur after the purchase of a security cannot form the basis for aiding and abetting liability.

29. Regular and routine banking practices cannot form the basis of aiding and abetting liability.

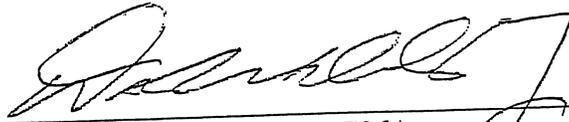
30. The interests sold by Marsha Schubert do not meet the definition of a security under Oklahoma law. To the extent the Court finds that the interests were securities, they were exempt from registration.

31. Plaintiff cannot demonstrate that Defendants acted with the requisite scienter.

32. Defendants reserve the right to amend and/or assert further defenses and affirmative defenses into the matters alleged in the Petition.

**PRAYER FOR RELIEF**

WHEREFORE, having fully answered, Defendants pray for judgment in its favor and against Plaintiff, and for such further relief as the Court may deem just and equitable.

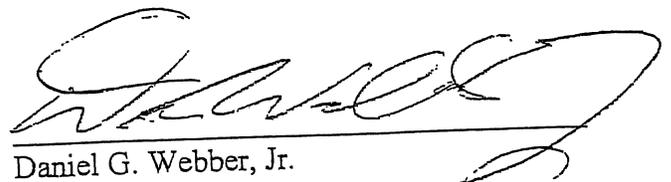
  
Patrick M. Ryan, OBA No. 7864  
Daniel G. Webber, Jr., OBA No. 16332  
Matthew C. Kane, OBA No. 19502  
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**ATTORNEYS FOR DEFENDANTS**  
**FARMERS & MERCHANTS BANK, FARMERS**  
**& MERCHANTS BANCSHARES, INC., JOHN**  
**V. ANDERSON and JOHN TOM ANDERSON**

**CERTIFICATE OF SERVICE**

I hereby certify that on this 13<sup>th</sup> day of November, 2006, a true and correct copy of the above and foregoing instrument was mailed, via U.S. First Class Mail, postage prepaid, to the following counsel of record:

Melanie Hall, Esq.  
Amanda Cornmesser, Esq.  
Gerri Stuckey, Esq.  
OKLAHOMA DEPARTMENT OF SECURITIES  
120 North Robinson Avenue, Suite 860  
Oklahoma City, Oklahoma 73102  
*Attorneys for Plaintiff Oklahoma Department of  
Securities, Irvin L. Faught, Administrator*

  
Daniel G. Webber, Jr.



**IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA**

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., )  
 )  
 Intervenor. )

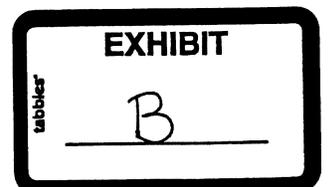
Case No. CJ-2006-3311

**AFFIDAVIT OF CAROL GRUIS**

STATE OF OKLAHOMA            )  
   )  
 COUNTY OF OKLAHOMA        )        **ss:**

Carol Gruis, being of lawful age and being duly sworn, deposes and states as follows:

1. I am the Director of Examinations of the Oklahoma Department of Securities (Department).
2. As part of my assigned duties as Director of Examinations, I oversee the registration of broker-dealers, agents, investment advisers and investment adviser representatives under the securities law of the state of Oklahoma.
3. I have reviewed the registration records of the Department for information relating to Marsha Schubert.

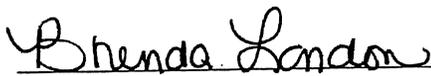


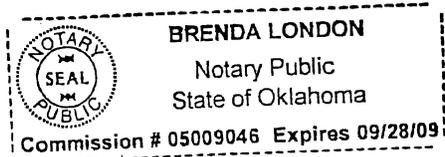
4. As a result of my review, I found that Marsha Schubert was registered as a broker-dealer agent of AXA Advisors, LLC (AXA), a registered broker-dealer and investment adviser, from May of 1992 to April of 2004.
5. I have found that Marsha Schubert was registered as an investment adviser representative of AXA from May 2000 to April of 2004.
6. I found that in May of 2004, Marsha Schubert became registered as a broker-dealer agent of Wilbanks Securities, Inc., a registered broker-dealer. Her registration with Wilbanks Securities, Inc. was terminated on October 11, 2004.

FURTHER AFFIANT SAITH NOT.

  
\_\_\_\_\_  
Carol Gruis

Subscribed and sworn to before me this 6th day of May, 2009.

  
\_\_\_\_\_  
Notary Public



**IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA**

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. )

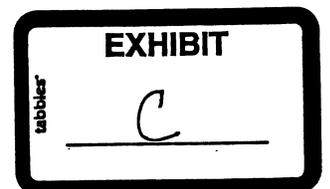
Case No. CJ-2006-3311

**AFFIDAVIT OF DAN CLARKE**

STATE OF OKLAHOMA )  
 ) ss:  
COUNTY OF OKLAHOMA )

Dan Clarke, being of lawful age and being duly sworn, deposes and states as follows:

1. I am Supervisory Investigator for the Oklahoma Department of Securities (Department). I maintain the designation of Certified Fraud Examiner from the Association of Certified Fraud Examiners.
2. As part of my assigned duties, I supervise and conduct or assist in investigations initiated by the Department's Enforcement Division by, *inter alia*, reviewing and analyzing pertinent bank account records to determine the sources and uses of funds flowing through such bank accounts.
3. At all times material hereto, Marsha Schubert (Schubert) owned, maintained and/or controlled several bank accounts including account number 34-7477 at Farmers and Merchants Bank (F&M Bank) in Crescent, Oklahoma (Schubert F&M Account), account number 35-9424 at F&M Bank (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 (Schubert BancFirst Account).



4. In connection with the above-styled action, I have reviewed and analyzed the deposit items to and disbursements from the Schubert F&M Account, the Kattails Account, the Farm Account, and the Schubert BancFirst Account, for the period beginning in December of 1999 and ending in October of 2004 (Relevant Period).
5. Prior to December 2002, the Schubert F&M Account was classified as a personal account. The status of the account was changed from personal to business in December 2002.
6. During the Relevant Period, Schubert deposited funds in excess of Two Hundred Sixty-Five Million Dollars (\$265,000,000) into the Schubert F&M Account.
7. During the Relevant Period, Schubert, doing business as Schubert and Associates, accepted funds from investors in excess of Two Hundred Million Dollars (\$200,000,000). The majority of the investor proceeds obtained by Schubert were deposited into the Schubert F&M Account where the proceeds were commingled with proceeds of bank loans, and Schubert's personal funds, such as commissions and royalty checks. A portion of the proceeds was deposited into the Kattails Account, the Farm Account or the Schubert BancFirst Account and commingled with other funds in those accounts.
8. Approximately 87 persons lost in excess of Nine Million Dollars (\$9,000,000) of their investments through Schubert and Associates.
9. During the Relevant Period, approximately 10,800 deposit and withdrawal transactions were effected in the Schubert F&M Account.
10. F&M Bank classified any deposit or withdrawal in excess of Twenty-Five Hundred Dollars (\$2,500) as a "Large Item." Pursuant to F&M Bank policy, the "Large Items" were subject to review in daily loan committee meetings.
11. Seventy-seven percent (77%) of the number of deposits into the Schubert F&M Account were in amounts in excess of Twenty-Five Hundred Dollars (\$2,500) and subject to review by the F&M Bank loan committee. These deposits totaled in excess of 2,100 in number and in excess of Two Hundred Sixty-Seven Million Five Hundred Thousand Dollars (\$267,500,000) in amount.
12. Prior to 2000, Schubert used the Schubert F&M Account as a personal checking account into which she deposited her brokerage and insurance commission checks and from which she paid ordinary living expenses, some farm expenses, and expenses related to Kattails, a small retail business owned and operated by Schubert and her daughter.
13. Between December 19, 1999 and January 18, 2000, the average daily balance in the Schubert F&M Account was Nine Hundred Ninety-Nine Dollars and Fifty-Five Cents (\$999.55). The approximate average daily balances in the Schubert F&M Account for the next four (4) banking cycles were:

- January 19, 2000 through February 18, 2000 \$ - 987.00
- February 19, 2000 through March 17, 2000 \$ - 1,028.00
- March 18, 2000 through April 18, 2000 \$ 2,934.00
- April 19, 2000 through May 18, 2000 \$ 604.00

14. After May 18, 2000, the average daily balance in the Schubert F&M Account began to increase, reaching a level of Twenty-Nine Thousand Three Hundred Nine Dollars (\$29,309) for the statement period ended November 18, 2002, and reaching a high of Two Hundred Seven Thousand One Hundred Seventy Dollars (\$207,170) for the statement period ended October 17, 2003.

15. The volume and level of activity in the Schubert F&M Account peaked during the thirty (30) day period between October 18, 2003, and November 18, 2003, when in excess of Twenty-Nine Million Dollars (\$29,000,000) was deposited into the Schubert F&M Account and in excess of Twenty-Nine Million Dollars (\$29,000,000) was disbursed from the Schubert F&M Account.

16. In addition to the float from a check kite, Schubert repeatedly used money she had received from more recent investors to make returns of purported investment profits, of which one example is shown below:

- (a) The beginning balance in the Schubert F&M Account on March 9, 2001, was Four Thousand Nine Hundred Eighty-Six Dollars and Thirty-Six Cents (\$4,986.36).
- (b) On or about March 9, 2001, Schubert deposited investment funds of Thirty Thousand Dollars (\$30,000) from R. Walker (Walker), an Oklahoma resident. The money was deposited into the Schubert F&M Account. Two Thousand Dollars (\$2,000) was simultaneously deducted from the deposit and transferred to the Kattails Account, for a net deposit of Twenty-Eight Thousand Dollars (\$28,000) to the Schubert F&M Account.
- (c) On or about March 9, 2001, Schubert deposited investment funds of Thirty-Five Thousand Dollars (\$35,000) from R. Hedrick (Hedrick), an Oklahoma resident. The money was deposited into the Schubert F&M Account.
- (d) From March 9, 2001 to March 16, 2001, Schubert used the Walker and Hedrick funds as follows:
  - (1) to make disbursements totaling more than Forty Thousand Dollars (\$40,000) to other investors;
  - (2) to make three loan payments to F&M Bank totaling \$7,017.17; and

(3) to pay personal, farming, and Kattails expenses.

17. A pattern developed whereby Schubert received an amount of money from one or more investors on a given day and then returned a disbursement of a similar or increasing amount very soon thereafter. The following sequence of transactions through the Schubert F&M Account illustrates this pattern with respect to Investor Johnny Stanbrough (Stanbrough):

Transaction Date	Funds From Stanbrough	Disbursements To Stanbrough
February 11, 2002	\$32,020.40	
February 13, 2002		\$32,989.00
February 19, 2002		\$ 2,687.30
February 20, 2002	\$36,600.00	
February 25, 2002		\$37,782.42
March 5, 2002	\$46,282.00	
March 6, 2002		\$48,282.00
March 13, 2002	\$15,000.00	
March 13, 2002		\$15,424.84
March 18, 2002	\$15,284.00	
March 18, 2002		\$ 2,955.17
March 19, 2002		\$13,884.00
April 1, 2002	\$52,480.00	
April 2, 2002		\$53,580.00
April 8, 2002	\$14,893.50	
April 9, 2002		\$15,002.40

The primary sources of the funding of the disbursements from the Schubert F&M Account to Stanbrough were deposits to the Schubert F&M Account from the Farm Account, other investors, and Stanbrough himself. This pattern continued as to Stanbrough until December of 2002, when the transaction amounts were more than double the amounts in the month of April.

18. As illustrated by the chart below, the volume of activity in the Schubert F&M Account, in terms of number and dollar amount of debit and credit transactions, dramatically increased over the course of the Relevant Period:

Banking Cycle Ended	Number of Deposits/ Credits	Total Amount of Deposits/Credits	Number of Checks/ Debits	Total Amount of Checks/Debits
01/18/00	17	\$23,328.78	63	\$17,267.35
02/18/00	11	\$26,032.48	76	\$32,070.48
03/17/00	5	\$8,306.67	57	\$11,722.22
04/18/00	18	\$45,172.15	101	\$42,148.10
05/18/00	19	\$66,656.63	117	\$67,601.71
06/16/00	7	\$10,038.79	62	\$16,559.52
07/18/00	9	\$13,549.86	42	\$6,613.60

Banking Cycle Ended	Number of Deposits/ Credits	Total Amount of Deposits/Credits	Number of Checks/ Debits	Total Amount of Checks/Debits
08/17/00	14	\$56,147.79	92	\$54,545.53
09/18/00	7	\$82,521.65	82	\$55,987.63
10/18/00	11	\$73,074.61	115	\$96,146.12
11/17/00	19	\$147,843.16	93	\$151,625.15
12/18/00	13	\$63,679.04	55	\$65,586.06
01/18/01	13	\$86,700.44	62	\$97,675.49
02/16/01	15	\$60,778.30	48	\$53,517.58
03/16/01	10	\$81,807.92	70	\$67,434.37
04/18/01	13	\$55,550.91	68	\$65,387.72
05/17/01	20	\$85,016.43	103	\$76,892.19
06/18/01	11	\$52,721.21	82	\$60,990.68
07/18/01	20	\$105,244.56	83	\$108,189.35
08/17/01	12	\$143,897.74	69	\$132,899.01
09/18/01	16	\$233,771.89	67	\$241,772.30
10/18/01	8	\$438,157.74	93	\$408,354.86
11/16/01	17	\$207,642.50	69	\$220,322.85
12/18/01	19	\$253,211.01	97	\$262,799.47
01/17/02	11	\$211,471.18	81	\$217,976.29
02/15/02	18	\$154,818.58	77	\$155,861.86
03/18/02	22	\$595,677.23	99	\$568,996.26
04/18/02	20	\$546,295.00	122	\$564,751.97
05/17/02	22	\$721,007.70	112	\$716,298.16
06/18/02	22	\$460,444.03	106	\$439,977.04
07/18/02	22	\$1,448,755.83	141	\$1,479,353.59
08/16/02	21	\$1,833,352.08	121	\$1,835,376.76
09/18/02	31	\$3,608,657.47	188	\$3,606,969.81
10/17/02	27	\$5,356,593.96	237	\$5,343,227.62
11/18/02	24	\$7,835,486.81	223	\$7,790,529.25
12/18/02	24	\$11,651,623.63	231	\$11,523,012.18
01/16/03	27	\$13,042,798.44	182	\$13,102,759.89
02/18/03	33	\$10,191,331.03	152	\$10,229,044.80
03/18/03	24	\$10,190,719.81	142	\$10,184,310.86
04/18/03	26	\$13,354,948.00	156	\$13,392,688.68
05/16/03	22	\$14,913,106.00	169	\$14,928,209.90
06/18/03	27	\$19,334,262.26	157	\$18,890,451.04
07/17/03	32	\$18,648,777.18	160	\$19,124,025.89
08/18/03	38	\$21,409,096.97	175	\$21,356,556.70
09/18/03	60	\$26,525,252.38	211	\$26,419,019.14
10/17/03	60	\$26,778,633.88	173	\$26,864,589.70
11/18/03	58	\$29,001,807.80	211	\$29,024,398.36
12/18/03	45	\$6,907,041.09	180	\$6,951,448.60
01/16/04	39	\$5,318,936.09	145	\$5,328,318.82
02/18/04	37	\$5,135,517.60	156	\$5,131,983.28
03/18/04	25	\$387,099.38	122	\$374,139.83
04/16/04	35	\$779,584.52	151	\$585,144.15
05/18/04	38	\$1,272,643.67	166	\$1,310,530.01

Banking Cycle Ended	Number of Deposits/ Credits	Total Amount of Deposits/Credits	Number of Checks/ Debits	Total Amount of Checks/Debits
06/03/04	14	\$658,585.23	97	\$822,649.95
06/17/04	14	\$387,164.64	81	\$365,708.90
07/16/04	36	\$1,016,135.60	200	\$1,034,801.46
08/17/04	34	\$1,242,016.98	181	\$1,254,813.52
09/17/04	40	\$1,592,169.08	194	\$1,560,267.65
10/15/04	41	\$2,522,219.66	200	\$2,516,190.42
<b>Totals</b>	<b>1,393</b>	<b>\$267,454,883.05</b>	<b>7,365</b>	<b>\$267,408,491.68</b>

19. During the first ten (10) months of the Relevant Period, the amount of money deposited into the Schubert F&M Account was less than Eighty-Three Thousand Dollars (\$83,000) in any one month.

20. During the monthly banking cycle ended October 18, 2001, the amount of money flowing into the Schubert F&M Account was approximately Four Hundred Thirty-Eight Thousand One Hundred Fifty Dollars (\$438,150).

21. Between November 19, 2002 and December 18, 2002, the deposits and other credits to the Schubert F&M Account totaled in excess of Eleven Million Six Hundred Fifty Thousand Dollars (\$11,650,000).

22. The deposits to the Schubert F&M Account exceeded Twenty-Nine Million Dollars (\$29,000,000) during the monthly banking cycle ended November 18, 2003. That amount dramatically decreased to approximately One Million Thirty Thousand Dollars (\$1,030,000) when the check exchange transactions with Lance Berry (Berry), Bob Mathews (Mathews) and Marvin Wilcox (Wilcox) are excluded. The check exchange activity accounted for approximately ninety-six percent (96%) of the deposits into the Schubert F&M Account during the banking cycle ended November 18, 2003.

23. During the monthly banking cycle ended November 18, 2003, the disbursements from the Schubert F&M Account totaled in excess of Twenty-Nine Million Dollars (\$29,000,000). That amount dramatically decreased to approximately Four Hundred Eight Thousand Dollars (\$408,000) when the check exchange transactions with Berry, Mathews and Wilcox are excluded. The check exchange activity accounted for approximately ninety-eight percent (98%) of the disbursements from the Schubert F&M Account during this banking cycle.

24. The amounts of Schubert's commission checks deposited into the Schubert F&M Account was miniscule as compared to the increased levels of purported investment activity reflected by the investors' funds deposited into the account.

25. For the fourteen (14) consecutive months before December 2002, Schubert operated on uncollected fund balances in the Schubert F&M Account.

26. Even though Schubert was depositing large sums of money from investors into the Schubert F&M Account, the account was not reclassified from a personal account to a business account by the bank until December 2002. As a result of the reclassification, F&M Bank

benefited from the imposition of a service charge on uncollected balances in the Schubert F&M Account during fifteen (15) of the subsequent twenty-two (22) months.

Banking Cycle Ended	Approximate Average Collected Balance	Service Charge Debited by F&M Bank
January 16, 2003	\$ (472,320)	\$ 4,032.98
February 18, 2003	\$ (290,910)	\$ 2,826.61
March 18, 2003	\$ (414,960)	\$ 3,421.03
April 18, 2003	\$ (520,620)	\$ 5,058.53
May 16, 2003	\$ (679,760)	\$ 5,604.09
June 18, 2003	\$ (739,470)	\$ 6,749.54
July 17, 2003	\$ (830,220)	\$ 7,088.92
August 18, 2003	\$ (851,460)	\$ 8,022.34
September 18, 2003	\$ (1,113,460)	\$10,163.04
October 17, 2003	\$ (1,094,540)	\$ 9,990.36
November 18, 2003	\$ (1,221,590)	\$10,790.36
December 18, 2003	\$ (249,180)	\$ 2,201.06
January 16, 2004	\$ (271,710)	\$ 2,560.02
February 18, 2004	\$ (224,050)	\$ 1,979.02
March 18, 2004	\$ (1,430)	\$ 12.24
April 16, 2004	\$ 13,150	\$ 0.00
May 18, 2004	\$ 1,650	\$ 0.00
June 17, 2004	\$ 25,338	\$ 0.00
July 16, 2004	\$ (17,974)	\$ 0.00
August 17, 2004	\$ 18	\$ 0.00
September 17, 2004	\$ (2,011)	\$ 0.00
October 15, 2004	\$ (67,288)	\$ 0.00
<b>Total</b>		<b>\$80,500.14</b>

### Schubert's Relationship with Berry, Mathews, and Wilcox

27. Identifiable patterns of deposits and disbursements developed between the Schubert F&M Account and the NBanC accounts of Mathews and Wilcox in December of 2002. The same pattern of deposits and disbursements developed between the Schubert F&M Account and the NBanC account of Berry beginning in April of 2003. In addition to the same frequency and timing of transactions, the deposits to the Schubert F&M Account from the NBanC Accounts of Berry, Mathews, and Wilcox were often in identical amounts. The amounts of the disbursements from the Schubert F&M Account made to Berry, Mathews, and Wilcox were in identical amounts. With rare exception, the deposits and disbursements were in even dollar amounts. The following series of transactions in the Schubert F&M Account provides one of the numerous examples of these patterns:

Clearing Date	Depositor / Payee	Deposit Amount	Disbursement Amount
12/30/03	Lance Berry	\$93,750.00	\$0.00
12/30/03	Bob Mathews	\$93,750.00	\$0.00
12/30/03	Marvin Wilcox	\$93,750.00	\$0.00
12/30/03	Lance Berry	\$0.00	\$93,250.00
12/30/03	Bob Mathews	\$0.00	\$93,250.00
12/30/03	Marvin Wilcox	\$0.00	\$93,250.00
12/31/03	Lance Berry	\$95,806.00	\$0.00
12/31/03	Bob Mathews	\$95,806.00	\$0.00
12/31/03	Marvin Wilcox	\$95,806.00	\$0.00
12/31/03	Lance Berry	\$0.00	\$95,393.00
12/31/03	Bob Mathews	\$0.00	\$95,393.00
12/31/03	Marvin Wilcox	\$0.00	\$95,393.00

28. During October and November of 2003, the frequency and amounts of transactions between Schubert and Mathews, Wilcox, and Berry reached extraordinary levels. See Appendix C-1 through C-3 hereto.

29. Berry opened an F&M account (Berry F&M Account) with the transfer of \$5,000 from his NBanC account on or about November 12, 2003. Mathews opened an F&M account (Mathews F&M Account) with the transfer of \$5,000 from his NBanC account on or about November 10, 2003. Wilcox opened an F&M account (Wilcox F&M Account) with the transfer of \$5,000 from his NBanC account on or about November 10, 2003.

30. During November of 2003, the following transactions between Wilcox and Schubert were effected through F&M Bank – transactions which simply involved the circular flow of money between the two F&M Bank accounts and the Wilcox NBanC account on the same banking day or on consecutive banking days:

Date	Wilcox NBanC Account	Wilcox F&M Account	Schubert F&M Account	Net Daily Activity Between Accounts
11/10/2003	-\$5,000.00	\$5,000.00		
	-\$479,000.00		\$479,000.00	
<b>Total Daily Activity</b>	<b>-\$484,000.00</b>	<b>\$5,000.00</b>	<b>\$479,000.00</b>	<b>\$0.00</b>
11/12/2003	-\$200,000.00	\$200,000.00		
	-\$260,000.00		\$260,000.00	
	\$484,140.00		-\$484,140.00	
<b>Total Daily Activity</b>	<b>\$24,140.00</b>	<b>\$200,000.00</b>	<b>-\$224,140.00</b>	<b>\$0.00</b>

Date	Wilcox NBanC Account	Wilcox F&M Account	Schubert F&M Account	Net Daily Activity Between Accounts
11/13/2003		-\$199,700.00	\$199,700.00	
	-\$270,000.00		\$270,000.00	
	\$479,201.00		-\$479,201.00	
<b>Total Daily Activity</b>	<b>\$209,201.00</b>	<b>-\$199,700.00</b>	<b>-\$9,501.00</b>	<b>\$0.00</b>
11/14/2003	-\$15,000.00	\$15,000.00		
	-\$259,800.00		\$259,800.00	
	\$260,500.00		-\$260,500.00	
<b>Total Daily Activity</b>	<b>-\$14,300.00</b>	<b>\$15,000.00</b>	<b>-\$700.00</b>	<b>\$0.00</b>
11/17/2003	-\$245,000.00		\$245,000.00	
	-\$40,000.00	\$40,000.00		
		-\$17,000.00	\$17,000.00	
	\$260,201.00		-\$260,201.00	
<b>Total Daily Activity</b>	<b>-\$24,799.00</b>	<b>\$23,000.00</b>	<b>\$1,799.00</b>	<b>\$0.00</b>
11/18/2003		\$20,000.00		
		-\$20,000.00		
	-\$210,000.00		\$210,000.00	
		-\$41,000.00	\$41,000.00	
	\$249,000.00		-\$249,000.00	
<b>Total Daily Activity</b>	<b>\$39,000.00</b>	<b>-\$41,000.00</b>	<b>\$2,000.00</b>	<b>\$0.00</b>
11/19/2003	-\$176,000.00		\$176,000.00	
	\$220,000.00		-\$220,000.00	
<b>Total Daily Activity</b>	<b>\$44,000.00</b>	<b>\$0.00</b>	<b>-\$44,000.00</b>	<b>\$0.00</b>
11/20/2003	-\$150,000.00		\$150,000.00	
		-\$21,000.00	\$21,000.00	
	-\$25,000.00	\$25,000.00		
	\$200,000.00		-\$200,000.00	
<b>Total Daily Activity</b>	<b>\$25,000.00</b>	<b>\$4,000.00</b>	<b>-\$29,000.00</b>	<b>\$0.00</b>

31. During the days the Wilcox F&M Account was open, the only evidence of a transaction in which securities were purchased by Schubert on behalf of Wilcox was an outgoing \$3,000 wire transmission to AXA.

32. With the exception of an outgoing wire in the amount of Twenty-Five Hundred Dollars (\$2,500) transmitted on behalf of Berry, the same pattern of activity described as to Wilcox in paragraphs 30 and 31 above occurred as to Berry and Mathews.

33. Wilcox was unjustly enriched in an amount exceeding Five Hundred Thousand Dollars (\$500,000).

34. Mathews was unjustly enriched in an amount exceeding Five Hundred Twenty Thousand Dollars (\$520,000).

35. Berry was unjustly enriched in an amount exceeding Thirty-Three Thousand Dollars (\$33,000).

36. As depicted below, most of the transactions that cleared the Schubert F&M Account on November 19, 2003, involved "Large Item" distributions to and "Large Item" deposits from Berry, Mathews, and Wilcox. There are no corresponding entries for disbursements to or from any brokerage, investment or clearing firm for the purchase or sale of securities through the account.

Clearing Date	Depositor / Payee	Deposit Amount	Disbursement Amount	Account Balance
11/19/03	Lance Berry	\$0.00	\$200,000.00	\$135,704.06
11/19/03	Marvin Wilcox	\$0.00	\$220,000.00	-\$355,704.06
11/19/03	Bob Mathews	\$0.00	\$220,000.00	-\$575,704.06
11/19/03	Bob Mathews	\$185,000.00	\$0.00	-\$390,704.06
11/19/03	Lance Berry	\$178,000.00	\$0.00	-\$212,704.06
11/19/03	Marvin Wilcox	\$176,000.00	\$0.00	-\$36,704.06
11/19/03	Bob Mathews	\$21,000.00	\$0.00	-\$15,704.06
11/19/03	Lance Berry	\$21,000.00	\$0.00	\$5,295.94
11/19/03	Marvin Wilcox	\$21,000.00	\$0.00	\$26,295.94
11/19/03	Bob Mathews	\$11,200.00	\$0.00	\$37,495.94
11/19/03	Justin Tarrant (F&M officer)	\$0.00	\$4,000.00	\$33,495.94
11/19/03	P. Sorrentino	\$0.00	\$1,000.00	\$32,495.94
11/19/03	K. Kadavy	\$0.00	\$2,000.00	\$30,495.94
11/19/03	C. Blair	\$0.00	\$1,010.00	\$29,485.94

### Investment Transactions

37. During the Relevant Period, less than Two Million Dollars (\$2,000,000) was wired from F&M Bank for the purchase of stocks, options or any other type of investment. This amount represented approximately one-half of one percent (.005) of the over Two Hundred Sixty-Seven Million Dollars (\$267,000,000) deposited into the Schubert F&M Account.

38. During the Relevant Period, less than One Million Dollars (\$1,000,000) in investment sales proceeds was wired into F&M Bank from a brokerage, investment or clearing firm. This amount represented four-tenths of one percent (.004%) of the over \$267,000,000 in disbursements made from the Schubert F&M Account.

39. On at least two occasions in connection with loans made to Schubert, F&M Bank accepted loan payments paid from the Schubert F&M Account from investor funds. Transactions in the Schubert F&M Account that preceded and followed September 2003 loan payments to F&M Bank were as follows:

Clearing Date	Depositor / Payee	Deposit Amount	Disbursement Amount	Account Balance
9/19/2003	GMAC	\$0.00	\$750.00	\$172,092.32
9/19/2003	Lance Berry	\$0.00	\$442,901.00	-\$270,808.68
9/19/2003	Bob Mathews	\$0.00	\$420,398.00	-\$691,206.68
9/19/2003	Marvin Wilcox	\$0.00	\$430,503.00	-\$1,121,709.68
9/19/2003	Lance Berry	\$226,000.00	\$0.00	-\$895,709.68
9/19/2003	Bob Mathews	\$217,000.00	\$0.00	-\$678,709.68
9/19/2003	Marvin Wilcox	\$217,000.00	\$0.00	-\$461,709.68
9/19/2003	Lance Berry	\$217,000.00	\$0.00	-\$244,709.68
9/19/2003	Bob Mathews	\$215,000.00	\$0.00	-\$29,709.68
9/19/2003	Marvin Wilcox	\$215,000.00	\$0.00	\$185,290.32
9/19/2003	Dress Barn	\$0.00	\$130.01	\$185,160.31
9/19/2003	American Express	\$0.00	\$3,458.69	\$181,701.62
9/19/2003	American Express	\$0.00	\$2,500.00	\$179,201.62
9/22/2003	Dillard's	\$0.00	\$489.86	\$178,711.76
9/22/2003	Dillard's	\$0.00	\$187.90	\$178,523.86
9/22/2003	Rack Room Shoes	\$0.00	\$166.58	\$178,357.28
9/22/2003	Kohl's	\$0.00	\$130.84	\$178,226.44
9/22/2003	<b>Farmers &amp; Merchants Bank</b>	<b>\$0.00</b>	<b>\$2,000.00</b>	<b>\$176,226.44</b>
9/22/2003	Kattails	\$0.00	\$2,000.00	\$174,226.44
9/22/2003	T. Brown	\$0.00	\$1,029.00	\$173,197.44
9/22/2003	<b>Farmers &amp; Merchants Bank</b>	<b>\$0.00</b>	<b>\$487.07</b>	<b>\$172,710.37</b>
9/22/2003	C. Pumphrey	\$0.00	\$5,313.33	\$167,397.04
9/22/2003	Kathleen Gibson	\$0.00	\$4,687.21	\$162,709.83
9/22/2003	M. Allen	\$0.00	\$2,500.00	\$160,209.83
9/22/2003	D. Walker	\$0.00	\$500.00	\$159,709.83
9/22/2003	Lance Berry	\$0.00	\$441,000.00	-\$281,290.17
9/22/2003	Bob Mathews	\$0.00	\$431,000.00	-\$712,290.17
9/22/2003	Marvin Wilcox	\$0.00	\$421,000.00	-\$1,133,290.17
9/22/2003	Dollar General Store	\$0.00	\$6.53	-\$1,113,296.70
9/22/2003	<b>Farmers &amp; Merchants Bank</b>	<b>\$0.00</b>	<b>\$105,010.11</b>	<b>-\$1,238,306.81</b>
9/22/2003	Lance Berry	\$440,500.00	\$0.00	-\$797,806.81
9/22/2003	Bob Mathews	\$430,500.00	\$0.00	-\$367,306.81
9/22/2003	Marvin Wilcox	\$420,500.00	\$0.00	\$53,193.19
9/22/2003	Garden Ridge	\$0.00	\$84.40	\$53,108.79

Nineteen (19) of the thirty-four (34) transactions listed above were "Large Items" subject to review by the F&M Bank loan committee.

40. Funds from investors that were deposited into the Schubert F&M Account were used for other purposes including, but not limited to, the payment of purported profits to other investors,

restoration of a muscle car, and the purchase of a condominium in Branson, Missouri. Transactions in the Schubert F&M Account that were paid by F&M Bank on October 16, 2003, included additional loan payments to F&M Bank and the purchase of the condominium:

Clearing Date	Depositor / Payee	Deposit Amount	Disbursement Amount	Description	Account Balance
10/16/03	Muscle Car Restoration	\$0.00	\$7,398.75		\$320,461.03
10/16/03	B. Schubert	\$0.00	\$500.00		\$319,961.03
10/16/03	Lance Berry	\$0.00	\$479,801.00		-\$159,839.97
10/16/03	Bob Mathews	\$0.00	\$442,900.00		-\$602,739.97
10/16/03	Marvin Wilcox	\$0.00	\$467,907.00		-\$1,070,646.97
10/16/03	L. Jackson	\$0.00	\$20.00		-\$1,070,666.97
10/16/03	Lance Berry	\$480,000.00	\$0.00		-\$590,666.97
10/16/03	Bob Mathews	\$445,000.00	\$0.00		-\$145,666.97
10/16/03	Marvin Wilcox	\$469,000.00	\$0.00		\$323,333.03
10/16/03	Discover Business Services	\$59.70	\$0.00		\$323,392.73
10/16/03	Tackett, E. E.	\$0.00	\$300.00		\$323,092.73
10/16/03	Farmers & Merchants Bank	\$0.00	\$1,000.00	Loan payment	\$322,092.73
10/16/03	Farmers & Merchants Bank	\$0.00	\$412.83	Loan payment	\$321,679.90
10/16/03	TriLakes Escrow	\$0.00	\$209,641.45	Condo	\$112,038.45
10/16/03	G. Yenzer	\$0.00	\$200.00		\$111,838.45

41. The condominium in Missouri was purchased with a cashier's check in the amount of Two Hundred Nine Thousand Six Hundred Forty-One Dollars and Forty-Five Cents (\$209,641.45) drawn from the Schubert F&M Account, issued by F&M Bank and signed by John Tom Anderson.

42. The source of funding for the cashier's check to buy the condominium was investor funds and F&M loan proceeds for the purchase of cattle.

### Unauthorized Activity

43. On or about March 25, 2004, at Schubert's direction, F&M Bank transferred \$60,000 from one of the estate accounts of Leland Schubert to the Schubert F&M Account. The transfer was a "Large Item" subject to review by the F&M Bank loan committee.

44. On the same date, the following disbursements to investors, including Beth Armer, an F&M Bank employee, were approved for payment from funds in the Schubert F&M Account:

Payee	Amount
Lance Berry	\$34,295
Bob Mathews	\$17,450
Beth Armer	\$ 6,250
<b>Total</b>	<b>\$57,995</b>

These disbursements were "Large Items" subject to review by the F&M Bank loan committee.

45. On or about May 18, 2004, a check in the amount of \$80,000 drawn on one of the Leland Schubert estate accounts was deposited into the Schubert F&M Account. The deposit was a "Large Item" subject to review by the F&M Bank loan committee.

46. On the following day, May 19, 2004, the following disbursements to investors totaling approximately Four Hundred Thirteen Thousand One Hundred Twenty-Six Dollars (\$413,126) were approved for payment from funds in the Schubert F&M Account:

Payee	Amount
Kathleen Gibson	\$ 212,680.00
O. Ham	\$ 84,693.20
Marion Wilcox	\$ 52,142.00
S. Phillips	\$ 48,401.00
Lance Berry	\$ 15,210.00
<b>Total</b>	<b>\$ 413,126.20</b>

These disbursements were "Large Items" subject to review by the F&M Bank loan committee.

47. On or about December 15, 2003, F&M Bank allowed Schubert to liquidate the Schubert Implement CD, a certificate of deposit owned by Schubert Implement Co., Inc. (Schubert Implement), a company owned by Leland Schubert. Schubert was not authorized to act on behalf of Schubert Implement. F&M Bank credited the Schubert F&M Account in the amount of the proceeds.

48. As illustrated below, the proceeds from the liquidation of the Schubert Implement certificate of deposit were used as follows:

Clearing Date	Depositor / Payee	Deposit Amount	Disbursement Amount	Beginning Account Balance
				\$17,154.83
12/15/03	J. Ward	\$0.00	\$3,000.00	
12/15/03	Lance Berry	\$0.00	\$89,923.00	
12/15/03	Bob Mathews	\$0.00	\$89,923.00	
12/15/03	M. Wilcox	\$0.00	\$89,923.00	
12/15/03	Lance Berry	\$88,400.00	\$0.00	
12/15/03	Bob Mathews	\$88,400.00	\$0.00	
12/15/03	M. Wilcox	\$88,400.00	\$0.00	
12/15/03	Schubert Implement Co., Inc.	\$50,824.94	\$0.00	
12/15/03	Cash	\$0.00	\$500.00	
12/15/03	Cash	\$0.00	\$300.00	
12/15/03	Equitable Life Insurance	\$0.00	\$78.86	
12/15/03	Farmers & Merchants Bank	\$0.00	\$502.53	
12/15/03	Kattails	\$0.00	\$5,000.00	
12/15/03	B. Schubert	\$0.00	\$700.00	
12/15/03	E. Tackett	\$0.00	\$350.00	
12/15/03	S. Wilcox	\$0.00	\$710.00	
12/16/03				\$52,269.38
12/16/03	Lance Berry	\$89,100.00	\$0.00	
12/16/03	Bob Matthews	\$89,100.00	\$0.00	
12/16/03	Marvin Wilcox	\$89,100.00	\$0.00	
12/16/03	Marvin Wilcox	\$0.00	\$89,907.40	
12/16/03	Bob Mathews	\$0.00	\$89,907.40	
12/16/03	Lance Berry	\$0.00	\$89,907.40	
12/16/03	L. Jones	\$0.00	\$2,293.40	
12/16/03	K. Gibson	\$0.00	\$2,485.00	
12/16/03	Discover Business Services	\$227.85	\$0.00	
12/16/03	Discover Business Services	\$78.18	\$0.00	
12/16/03	Discover Business Services	\$51.00	\$0.00	
12/16/03	Farmers & Merchants Bank	\$0.00	\$412.83	
12/17/03				\$45,012.98

49. The credit to the Schubert F&M Account from the beginning balance liquidation of the Schubert Implement CD, and the disbursements to Berry, Wilcox, Mathews and Kattails were all "Large Items" subject to review by the F&M Bank loan committee on the next banking day.

50. There was no evidence of the purchase of stocks, options or any other type of investment on behalf of Schubert Implement Co., Inc., or the estate of Leland Schubert, through the Schubert F&M Account.

## Lending Activity

51. During the Relevant Period, F&M Bank entered into over seventy-five (75) new loans and refinancings with Schubert for purported purchases of cattle, vehicles, equipment, a mobile home, and real estate. The principal amount of such financings totaled over One Million Four Hundred Thousand Dollars (\$1,400,000). The interest rate charged by F&M Bank on these loans ranged from six percent to fifteen percent (6%-15%).

52. On more than one occasion, F&M Bank deposited proceeds of cattle loans made to Schubert into the Schubert F&M Account, thereby commingling loan proceeds with investor funds in the account.

53. Bank employees, to include Stanton, Johnson and Tarrant, received purported investment profits through checks drawn on the same F&M Bank account into which loan proceeds were deposited.

## Other Commingling of Funds

54. During the Relevant Period, F&M Bank allowed Schubert to commingle funds from investors with funds in the Kattails Account. Kattails, as described above, was a small gift shop that also offered embroidery services.

55. For example, on or about November 9, 2001, Schubert deposited a check from Stanbrough in the amount of Thirty-Five Thousand Six Hundred Dollars (\$35,600) into the Schubert F&M Account and deducted Twenty-Five Thousand Six Hundred Dollars (\$25,600) for transfer to the Kattails Account, for a net deposit to the Schubert F&M Account of Ten Thousand Dollars (\$10,000). Both the Stanbrough check of \$35,600 and the \$25,600 transfer to the Kattails Account were "Large Items" subject to review by the F&M Bank loan committee.

56. Another example occurred on or about December 13, 2001, when Schubert deposited into the Schubert F&M Account a check drawn on the Mathews NBanC Account in the amount of Twenty-Nine Thousand Seven Hundred Twenty Dollars (\$29,720). Schubert deducted Twenty-One Thousand Dollars (\$21,000) for transfer to the Kattails Account, for a net deposit to the Schubert F&M Account of Eight Thousand Seven Hundred Twenty Dollars (\$8,720). Mathews' check of \$29,720 and the \$21,000 transfer to the Kattails Account were "Large Items" subject to review by the F&M Bank loan committee.

57. The following chart depicts other examples of "Large Items" received by Schubert from investors that were deposited into the Kattails Account at F&M Bank and were subject to review by the F&M Bank loan committee:

Date Cleared	Payor	Amount
October 20, 2000	Johnny Stanbrough	\$ 30,000.00
November 21, 2000	Betty Mathews Trust	\$ 7,500.00
November 21, 2000	W.R. Mathews Trust	\$ 7,500.00
February 14, 2001	R. Walker	\$ 20,000.00

Date Cleared	Payor	Amount
June 15, 2001	Johnny Stanbrough	\$ 8,500.00
September 12, 2001	Bob Mathews	\$ 33,000.00
September 18, 2001	Johnny Stanbrough	\$ 35,741.81
September 25, 2001	B.J. Walker Revocable Trust	\$183,000.00
November 7, 2001	Betty R. Mathews Trust	\$ 12,000.00
November 7, 2001	W.R. Mathews Trust	\$ 10,000.00
March 7, 2002	Betty Mathews Trust	\$ 14,000.00
March 7, 2002	W.R. Mathews Trust	\$ 14,000.00
March 22, 2002	Betty R. Mathews Trust	\$ 17,029.00
March 22, 2002	W.R. Mathews Trust	\$ 17,029.00
July 5, 2002	Johnny Stanbrough	\$ 20,000.00
July 22, 2002	Johnny Stanbrough	\$ 39,400.00
August 28, 2002	Bob Mathews	\$ 3,786.00
June 24, 2003	P. Pourchot	\$ 18,289.00
July 2, 2003	P. Pourchot	\$ 25,800.00
July 10, 2003	Marvin Wilcox	\$ 8,000.00
July 10, 2003	Lance Berry	\$ 8,000.00
July 10, 2003	Bob Mathews	\$ 8,000.00
September 10, 2003	P. Pourchot	\$ 25,000.00
February 18, 2004	Marion Wilcox	\$ 20,000.00
February 18, 2004	R. Owens	\$ 10,000.00
May 5, 2004	L. Shelley	\$ 20,000.00
May 7, 2004	S. Broughton	\$ 35,000.00
May 7, 2004	L. Wilcox	\$ 35,000.00
May 7, 2004	Lance Berry	\$ 15,210.00
September 21, 2004	Lance Berry	\$ 4,240.00

58. The following chart depicts examples of "Large Items" disbursed by Schubert from the Kattails Account to investors that were subject to review by the F&M Bank loan committee:

Date Cleared	Payor	Amount
October 23, 2000	R. Hedrick	\$ 4,000.00
October 23, 2000	S. Hedrick	\$ 4,000.00
December 7, 2000	Kathleen Gibson	\$ 8,083.00
June 18, 2001	Betty R. Mathews Trust	\$ 7,463.00
July 20, 2001	Betty R. Mathews Trust	\$ 9,202.47
July 20, 2001	W.R. Mathews Trust	\$ 9,171.81
July 20, 2001	Johnny Stanbrough	\$ 4,164.10
August 16, 2001	Betty R. Mathews Trust	\$ 5,000.00
August 16, 2001	W.R. Mathews Trust	\$ 5,000.00
August 30, 2001	W.R. Mathews Trust	\$ 11,789.00
August 31, 2001	Betty R. Mathews Trust	\$ 11,888.64

Date Cleared	Payor	Amount
September 12, 2001	Betty R. Mathews Trust	\$ 10,784.00
September 12, 2001	W.R. Mathews Trust	\$ 10,784.00
September 13, 2001	Johnny Stanbrough	\$ 10,784.00
September 19, 2001	Betty R. Mathews Trust	\$ 48,124.44
November 9, 2001	Betty R. Mathews Trust	\$ 12,840.00
November 9, 2001	W.R. Mathews Trust	\$ 11,183.40
December 13, 2001	Betty R. Mathews Trust	\$ 9,326.27
December 13, 2001	W.R. Mathews Trust	\$ 9,326.27

59. The commingling of funds described above continued until the Department obtained a temporary restraining order against Schubert on October 14, 2004.

### **F&M Bank Loan Officers**

60. Ed Stanton (Stanton) invested no money through Schubert and Associates, yet, between March 26, 2002, and October 5, 2004, received twelve (12) disbursements from Schubert totaling in excess of \$100,000. Ten (10) of the disbursements were made by checks drawn on the Schubert F&M Account.

61. Stanton received a check in the amount of \$7,500 drawn on the Schubert F&M Account on May 24, 2002, in connection with a purported option transaction. The check cleared the Schubert F&M Account on the same day.

62. Like eleven (11) of the twelve (12) disbursements received by Stanton, the May 2002 disbursement to Stanton was a "Large Item" subject to review by the F&M Bank loan committee. The "Large Item" disbursements to Stanton from Schubert included monthly payments of \$7,000 beginning in April of 2004, after his resignation from the bank.

63. The sources of funding for the May 2002 disbursement to Stanton were the deposits of Seven Thousand Dollars (\$7,000) each by Mathews and the W.R. Mathews Trust. Both deposits were "Large Items" subject to review by the F&M Bank loan committee.

64. There was no evidence of a deposit of an amount, representing the proceeds from the sale of a security, into the Schubert F&M Account in connection with the May 2002 disbursement or any other disbursement to Stanton.

65. Ten (10) "Large Item" disbursements were paid to Stanton from the Schubert F&M Account – the same account through which the check exchange between Schubert and Berry, Mathews, and Wilcox occurred, and the same account into which F&M Bank deposited the proceeds of cattle loans made to Schubert.

66. Justin Tarrant (Tarrant) invested no money through Schubert and Associates, yet, between February 28, 2003 and September 30, 2004, received twelve (12) disbursements from Marsha Schubert totaling in excess of Forty-Nine Thousand Dollars (\$49,000).

67. Ten (10) of the disbursements were made by checks drawn on the Schubert F&M Account.
68. Tarrant received a check in the amount of Six Thousand Five Hundred Dollars (\$6,500) drawn on the Schubert F&M Account on September 23, 2003, in connection with a purported securities transaction. The check cleared the Schubert F&M Account on the same day.
69. Like four (4) other disbursements received by Tarrant from the Schubert F&M Account, the September 2003 disbursement was a "Large Item" subject to review by the F&M Bank loan committee.
70. The September 2003 disbursement to Tarrant was paid by F&M Bank from the Schubert F&M Account at a time when the account had a large negative balance.
71. There was no evidence of a deposit of an amount, representing the proceeds from the sale of a security, into the Schubert F&M Account in connection with the September 2003 distribution or any other distribution to Tarrant.
72. Five (5) "Large Item" disbursements to Tarrant were paid out of the Schubert F&M Account – the same account through which the check exchange between Schubert and Berry, Mathews, and Wilcox occurred, and the same account into which F&M Bank deposited the proceeds of cattle loans made to Schubert.
73. Chad Johnson (Johnson) invested no money through Schubert and Associates, yet, between December 2, 2003 and July 15, 2004, received six (6) disbursements from Schubert totaling \$35,200.
74. Johnson received a check in the amount of \$5,000 drawn on the Schubert F&M Account on February 5, 2004. The check was paid by F&M Bank on the same day.
75. Three (3) of the four (4) disbursements from the Schubert F&M Account that were received by Johnson were "Large Items" subject to review by the F&M Bank loan committee.
76. The February 2004 disbursement to Johnson was made from an account balance comprising two deposits of \$98,028 and \$17,853.20 by Mathews; a deposit of \$98,028 by Berry; and a deposit of \$98,028 by Wilcox. All of these deposits and the disbursement to Johnson were "Large Items" subject to review by the F&M Bank loan committee.
77. There was no evidence of a deposit of an amount, representing the proceeds from the sale of a security, into the Schubert F&M Account in connection with the February 2004 disbursement or any other disbursement to Johnson.
78. Three (3) disbursements to Johnson paid out of the Schubert F&M Account – the same account through which the check exchange between Schubert and Berry, Mathews, and Wilcox occurred, and the same account into which F&M Bank deposited the proceeds of cattle loans made to Schubert.

79. On October 14, 2004, the date the Department filed its action against Schubert, the balance in the Schubert F&M Account was \$51,414.91. \$50,000 of that amount was investor funds

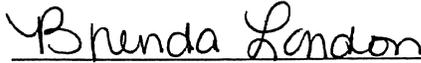
FURTHER AFFIANT SAYETH NOT.



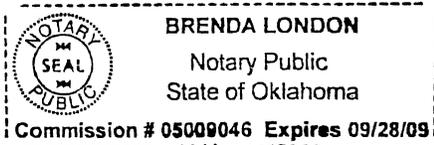
Dan Clarke  
OKLAHOMA DEPARTMENT OF SECURITIES  
120 North Robinson, Suite 860  
Oklahoma City, Oklahoma 73102  
(405) 280-7700

Subscribed and sworn to before me this 8th day of May, 2009.

(NOTARIAL SEAL)



Notary Public





**APPENDIX C-1**

**Bob Mathews**

<b>Statement Date</b>	<b>Transaction Date</b>	<b>Clear Date</b>	<b>Deposit to Schubert</b>	<b>Disbursement from Schubert</b>
10/17/03	09/19/03	09/19/03	\$215,000.00	
10/17/03	09/19/03	09/19/03	\$217,000.00	
10/17/03	09/18/03	09/19/03		\$420,398.00
10/17/03	09/22/03	09/22/03	\$430,500.00	
10/17/03	09/19/03	09/22/03		\$431,000.00
10/17/03	09/23/03	09/23/03	\$426,000.00	
10/17/03	09/22/03	09/23/03		\$431,000.00
10/17/03	09/24/03	09/24/03	\$430,000.00	
10/17/03	09/23/03	09/24/03		\$431,040.00
10/17/03	09/25/03	09/25/03	\$435,000.00	
10/17/03	09/24/03	09/25/03		\$426,542.00
10/17/03	09/26/03	09/26/03	\$429,000.00	
10/17/03	09/25/03	09/26/03		\$430,211.00
10/17/03	09/29/03	09/29/03	\$399,400.00	
10/17/03	09/26/03	09/29/03		\$400,100.00
10/17/03	09/30/03	09/30/03	\$430,506.00	
10/17/03	09/29/03	09/30/03		\$456,000.00
10/17/03	10/01/03	10/01/03	\$407,000.00	
10/17/03	09/30/03	10/01/03		\$399,724.00
10/17/03	10/02/03	10/02/03	\$431,000.00	
10/17/03	09/30/03	10/02/03		\$430,807.00
10/17/03	10/03/03	10/03/03	\$407,500.00	
10/17/03	10/02/03	10/03/03		\$407,357.00
10/17/03	10/06/03	10/06/03	\$433,000.00	
10/17/03	10/03/03	10/06/03		\$431,371.00
10/17/03	10/07/03	10/07/03	\$415,000.00	
10/17/03	10/05/03	10/07/03		\$408,100.00
10/17/03	10/08/03	10/08/03	\$436,000.00	
10/17/03	10/07/03	10/08/03		\$435,282.00
10/17/03	10/09/03	10/09/03	\$420,000.00	
10/17/03	10/08/03	10/09/03		\$415,901.00
10/17/03	10/10/03	10/10/03	\$438,000.00	
10/17/03	10/09/03	10/10/03		\$436,408.00
10/17/03	10/14/03	10/14/03	\$441,000.00	
10/17/03	10/10/03	10/14/03		\$420,506.00
10/17/03	10/15/03	10/15/03	\$462,000.00	

Statement Date	Transaction Date	Clear Date	Deposit to Schubert	Disbursement from Schubert
10/17/03	10/14/03	10/15/03		\$459,000.00
10/17/03	10/16/03	10/16/03	\$445,000.00	
10/17/03	10/15/03	10/16/03		\$442,900.00
10/17/03	10/17/03	10/17/03	\$461,000.00	
10/17/03	10/16/03	10/17/03		\$462,700.00
11/18/03	10/20/03	10/20/03	\$476,000.00	
11/18/03	10/20/03	10/20/03		\$446,000.00
11/18/03	10/21/03	10/21/03	\$473,000.00	
11/18/03	10/20/03	10/21/03		\$472,000.00
11/18/03	10/22/03	10/22/03	\$487,000.00	
11/18/03	10/22/03	10/22/03		\$30,000.00
11/18/03	10/20/03	10/22/03		\$456,000.00
11/18/03	10/23/03	10/23/03	\$487,500.00	
11/18/03	10/22/03	10/23/03		\$488,000.00
11/18/03	10/24/03	10/24/03	\$487,000.00	
11/18/03	10/23/03	10/24/03		\$487,400.00
11/18/03	10/27/03	10/27/03	\$486,000.00	
11/18/03	10/24/03	10/27/03		\$488,000.00
11/18/03	10/28/03	10/28/03	\$485,000.00	
11/18/03	10/27/03	10/28/03		\$486,000.00
11/18/03	10/29/03	10/29/03	\$485,000.00	
11/18/03	10/28/03	10/29/03		\$486,402.00
11/18/03	10/30/03	10/30/03	\$484,300.00	
11/18/03	10/29/03	10/30/03		\$484,000.00
11/18/03	10/31/03	10/31/03	\$487,000.00	
11/18/03	10/30/03	10/31/03		\$486,000.00
11/18/03	11/03/03	11/03/03	\$40,000.00	
11/18/03	11/03/03	11/03/03	\$488,000.00	
11/18/03	10/31/03	11/03/03		\$35,000.00
11/18/03	10/31/03	11/03/03		\$484,500.00
11/18/03	11/04/03	11/04/03	\$486,000.00	
11/18/03	11/03/03	11/04/03		\$487,000.00
11/18/03	11/05/03	11/05/03	\$487,000.00	
11/18/03	11/04/03	11/05/03		\$531,000.00
11/18/03	11/06/03	11/06/03	\$480,000.00	
11/18/03	11/05/03	11/06/03		\$486,100.00
11/18/03	11/07/03	11/07/03	\$484,000.00	
11/18/03	11/06/03	11/07/03		\$485,000.00
11/18/03	11/10/03	11/10/03	\$479,000.00	
11/18/03	11/07/03	11/10/03		\$480,500.00

Statement Date	Transaction Date	Clear Date	Deposit to Schubert	Disbursement from Schubert
11/18/03	11/12/03	11/12/03	\$250,000.00	
11/18/03	11/10/03	11/12/03		\$484,140.00
11/18/03	11/13/03	11/13/03	\$199,700.00	
11/18/03	11/13/03	11/13/03	\$260,000.00	
11/18/03	11/12/03	11/13/03		\$479,201.00
11/18/03	11/14/03	11/14/03	\$249,800.00	
11/18/03	11/13/03	11/14/03		\$250,500.00
11/18/03	11/17/03	11/17/03	\$15,000.00	
11/18/03	11/17/03	11/17/03	\$240,000.00	
11/18/03	11/17/03	11/17/03		\$250,201.00
11/18/03	11/18/03	11/18/03	\$31,000.00	
11/18/03	11/18/03	11/18/03	\$210,000.00	
11/18/03	11/17/03	11/18/03		\$239,000.00



**APPENDIX C-2**

**Marvin Wilcox**

<b>Statement Date</b>	<b>Transaction Date</b>	<b>Clear Date</b>	<b>Deposit to Schubert</b>	<b>Disbursement from Schubert</b>
10/17/03	09/19/03	09/19/03	\$217,000.00	
10/17/03	09/19/03	09/19/03	\$215,000.00	
10/17/03	09/19/03	09/18/03		\$430,503.00
10/17/03	09/22/03	09/22/03	\$420,500.00	
10/17/03	09/22/03	09/19/03		\$421,000.00
10/17/03	09/23/03	09/23/03	\$437,000.00	
10/17/03	09/23/03	09/22/03		\$442,803.00
10/17/03	09/24/03	09/24/03	\$421,000.00	
10/17/03	09/24/03	09/23/03		\$421,040.00
10/17/03	09/25/03	09/25/03	\$426,000.00	
10/17/03	09/25/03	09/24/03		\$437,542.00
10/17/03	09/26/03	09/26/03	\$420,000.00	
10/17/03	09/26/03	09/25/03		\$421,211.00
10/17/03	09/29/03	09/29/03	\$434,000.00	
10/17/03	09/29/03	09/26/03		\$435,409.00
10/17/03	09/30/03	09/30/03	\$424,000.00	
10/17/03	09/30/03	09/29/03		\$421,000.00
10/17/03	10/01/03	10/01/03	\$437,000.00	
10/17/03	10/01/03	09/30/03		\$434,300.00
10/17/03	10/02/03	10/02/03	\$425,100.00	
10/17/03	10/02/03	09/29/03		\$421,806.00
10/17/03	10/03/03	10/03/03	\$435,500.00	
10/17/03	10/03/03	10/03/03		\$800.00
10/17/03	10/03/03	10/02/03		\$434,500.00
10/17/03	10/06/03	10/06/03	\$427,000.00	
10/17/03	10/06/03	10/03/03		\$426,371.00
10/17/03	10/07/03	10/07/03	\$435,000.00	
10/17/03	10/07/03	10/05/03		\$435,707.00
10/17/03	10/08/03	10/08/03	\$428,000.00	
10/17/03	10/08/03	10/07/03		\$427,282.00
10/17/03	10/09/03	10/09/03	\$437,000.00	
10/17/03	10/09/03	10/08/03		\$435,901.00
10/17/03	10/10/03	10/10/03	\$429,000.00	
10/17/03	10/10/03	10/09/03		\$428,408.00
10/17/03	10/14/03	10/14/03	\$467,000.00	
10/17/03	10/14/03	10/10/03		\$437,506.00

Statement Date	Transaction Date	Clear Date	Deposit to Schubert	Disbursement from Schubert
10/17/03	10/15/03	10/15/03	\$462,000.00	
10/17/03	10/15/03	10/14/03		\$459,000.00
10/17/03	10/16/03	10/16/03	\$469,000.00	
10/17/03	10/16/03	10/15/03		\$467,907.00
10/17/03	10/17/03	10/17/03	\$461,000.00	
10/17/03	10/17/03	10/16/03		\$462,700.00
11/18/03	10/20/03	10/20/03	\$475,000.00	
11/18/03	10/20/03	10/17/03		\$470,000.00
11/18/03	10/21/03	10/21/03	\$473,000.00	
11/18/03	10/21/03	10/20/03		\$472,000.00
11/18/03	10/22/03	10/22/03	\$486,000.00	
11/18/03	10/22/03	10/20/03		\$15,000.00
11/18/03	10/22/03	10/20/03		\$470,000.00
11/18/03	10/23/03	10/23/03	\$487,500.00	
11/18/03	10/23/03	10/22/03		\$488,000.00
11/18/03	10/24/03	10/24/03	\$486,000.00	
11/18/03	10/24/03	10/23/03		\$486,400.00
11/18/03	10/27/03	10/27/03	\$486,000.00	
11/18/03	10/27/03	10/24/03		\$488,000.00
11/18/03	10/28/03	10/28/03	\$485,000.00	
11/18/03	10/28/03	10/27/03		\$486,000.00
11/18/03	10/29/03	10/29/03	\$485,000.00	
11/18/03	10/29/03	10/28/03		\$486,402.00
11/18/03	10/30/03	10/30/03	\$484,300.00	
11/18/03	10/30/03	10/29/03		\$484,000.00
11/18/03	10/31/03	10/31/03	\$487,000.00	
11/18/03	10/31/03	10/30/03		\$486,000.00
11/18/03	11/03/03	11/03/03	\$40,000.00	
11/18/03	11/03/03	11/03/03	\$488,000.00	
11/18/03	11/03/03	10/31/03		\$25,000.00
11/18/03	11/03/03	10/31/03		\$484,500.00
11/18/03	11/04/03	11/04/03	\$486,000.00	
11/18/03	11/04/03	11/03/03		\$487,000.00
11/18/03	11/05/03	11/05/03	\$487,000.00	
11/18/03	11/05/03	11/04/03		\$531,000.00
11/18/03	11/06/03	11/06/03	\$480,000.00	
11/18/03	11/06/03	11/05/03		\$486,100.00
11/18/03	11/07/03	11/07/03	\$484,000.00	
11/18/03	11/07/03	11/06/03		\$485,000.00
11/18/03	11/10/03	11/10/03	\$479,000.00	

Statement Date	Transaction Date	Clear Date	Deposit to Schubert	Disbursement from Schubert
11/18/03	11/10/03	11/07/03		\$480,500.00
11/18/03	11/12/03	11/12/03	\$260,000.00	
11/18/03	11/12/03	11/10/03		\$484,140.00
11/18/03	11/13/03	11/13/03	\$199,700.00	
11/18/03	11/13/03	11/13/03	\$270,000.00	
11/18/03	11/13/03	11/12/03		\$479,201.00
11/18/03	11/14/03	11/14/03	\$259,800.00	
11/18/03	11/14/03	11/13/03		\$260,500.00
11/18/03	11/17/03	11/17/03	\$17,000.00	
11/18/03	11/17/03	11/17/03	\$245,000.00	
11/18/03	11/17/03	11/17/03		\$500.00
11/18/03	11/17/03	11/14/03		\$260,201.00
11/18/03	11/18/03	11/18/03	\$41,000.00	
11/18/03	11/18/03	11/18/03	\$210,000.00	
11/18/03	11/18/03	11/17/03		\$249,000.00



**APPENDIX C-3**

**Lance Berry**

<b>Statement Date</b>	<b>Transaction Date</b>	<b>Clear Date</b>	<b>Deposit to Schubert</b>	<b>Disbursement from Schubert</b>
10/17/03	09/19/03	09/18/03		\$442,901.00
10/17/03	09/19/03	09/19/03	\$226,000.00	
10/17/03	09/19/03	09/19/03	\$217,000.00	
10/17/03	09/22/03	09/19/03		\$441,000.00
10/17/03	09/22/03	09/22/03	\$440,500.00	
10/17/03	09/23/03	09/22/03		\$443,893.00
10/17/03	09/23/03	09/23/03	\$438,000.00	
10/17/03	09/24/03	09/23/03		\$441,040.00
10/17/03	09/24/03	09/24/03	\$436,000.00	
10/17/03	09/25/03	09/24/03		\$438,542.00
10/17/03	09/25/03	09/25/03	\$435,000.00	
10/17/03	09/26/03	09/25/03		\$430,211.00
10/17/03	09/26/03	09/26/03	\$429,000.00	
10/17/03	09/29/03	09/26/03		\$435,409.00
10/17/03	09/29/03	09/29/03	\$434,000.00	
10/17/03	09/30/03	09/29/03		\$430,000.00
10/17/03	09/30/03	09/30/03	\$430,506.00	
10/17/03	10/01/03	09/30/03		\$434,300.00
10/17/03	10/02/03	09/30/03		\$430,806.00
10/17/03	10/01/03	10/01/03	\$434,000.00	
10/17/03	10/02/03	10/02/03	\$431,000.00	
10/17/03	10/03/03	10/02/03		\$434,500.00
10/17/03	10/03/03	10/03/03	\$435,000.00	
10/17/03	10/06/03	10/03/03		\$431,371.00
10/17/03	10/07/03	10/05/03		\$485,707.00
10/17/03	10/06/03	10/06/03	\$433,000.00	
10/17/03	10/08/03	10/06/03		\$435,282.00
10/17/03	10/07/03	10/07/03	\$485,000.00	
10/17/03	10/08/03	10/08/03	\$436,000.00	
10/17/03	10/09/03	10/08/03		\$475,000.00
10/17/03	10/09/03	10/09/03	\$480,000.00	
10/17/03	10/10/03	10/09/03		\$436,408.00
10/17/03	10/10/03	10/10/03	\$438,000.00	
10/17/03	10/14/03	10/10/03		\$480,980.00
10/17/03	10/14/03	10/14/03	\$479,000.00	

Statement Date	Transaction Date	Clear Date	Deposit to Schubert	Disbursement from Schubert
10/17/03	10/15/03	10/14/03		\$459,000.00
10/17/03	10/15/03	10/15/03	\$462,000.00	
10/17/03	10/16/03	10/15/03		\$479,801.00
10/17/03	10/16/03	10/16/03	\$480,000.00	
10/17/03	10/17/03	10/16/03		\$462,700.00
10/17/03	10/17/03	10/17/03	\$461,000.00	
11/18/03	10/20/03	10/20/03	\$480,000.00	
11/18/03	10/20/03	10/20/03		\$481,000.00
11/18/03	10/21/03	10/20/03		\$472,000.00
11/18/03	10/22/03	10/20/03		\$491,000.00
11/18/03	10/21/03	10/21/03	\$473,000.00	
11/18/03	10/22/03	10/22/03	\$490,000.00	
11/18/03	10/23/03	10/22/03		\$488,000.00
11/18/03	10/23/03	10/23/03	\$487,500.00	
11/18/03	10/24/03	10/23/03		\$490,400.00
11/18/03	10/24/03	10/24/03	\$489,000.00	
11/18/03	10/27/03	10/24/03		\$488,000.00
11/18/03	10/27/03	10/27/03	\$486,000.00	
11/18/03	10/28/03	10/27/03		\$489,000.00
11/18/03	10/28/03	10/28/03	\$488,000.00	
11/18/03	10/29/03	10/28/03		\$486,402.00
11/18/03	10/29/03	10/29/03	\$485,000.00	
11/18/03	10/30/03	10/29/03		\$487,000.00
11/18/03	10/30/03	10/30/03	\$487,000.00	
11/18/03	10/30/03	10/30/03	\$45,000.00	
11/18/03	10/31/03	10/30/03		\$486,000.00
11/18/03	10/31/03	10/31/03	\$487,000.00	
11/18/03	11/03/03	10/31/03		\$65,000.00
11/18/03	11/03/03	10/31/03		\$487,000.00
11/18/03	11/03/03	11/03/03	\$488,000.00	
11/18/03	11/04/03	11/03/03		\$487,000.00
11/18/03	11/04/03	11/04/03	\$486,000.00	
11/18/03	11/05/03	11/04/03		\$488,000.00
11/18/03	11/05/03	11/05/03	\$487,000.00	
11/18/03	11/06/03	11/05/03		\$486,100.00
11/18/03	11/06/03	11/06/03	\$480,000.00	
11/18/03	11/07/03	11/06/03		\$485,000.00
11/18/03	11/07/03	11/07/03	\$484,000.00	

Statement Date	Transaction Date	Clear Date	Deposit to Schubert	Disbursement from Schubert
11/18/03	11/10/03	11/07/03		\$480,500.00
11/18/03	11/10/03	11/10/03	\$479,000.00	
11/18/03	11/12/03	11/10/03		\$484,140.00
11/18/03	11/12/03	11/12/03	\$260,000.00	
11/18/03	11/13/03	11/12/03		\$479,201.00
11/18/03	11/13/03	11/13/03	\$270,000.00	
11/18/03	11/13/03	11/13/03	\$199,700.00	
11/18/03	11/14/03	11/13/03		\$260,500.00
11/18/03	11/14/03	11/14/03	\$259,800.00	
11/18/03	11/17/03	11/14/03		\$260,201.00
11/18/03	11/17/03	11/17/03	\$220,000.00	
11/18/03	11/17/03	11/17/03	\$17,000.00	
11/18/03	11/18/03	11/17/03		\$249,000.00
11/18/03	11/18/03	11/18/03	\$210,000.00	
11/18/03	11/18/03	11/18/03	\$15,000.00	



**IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA**

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. )

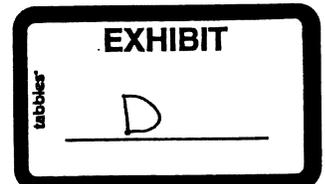
Case No. CJ-2006-3311

**AFFIDAVIT OF MARSHA KAY SCHUBERT**

STATE OF TEXAS )  
 ) SS.  
COUNTY OF BRAZOS )

I, Marsha Kay Schubert, of lawful age, being first duly sworn deposes and states:

1. I am currently serving a ten (10) year sentence in the Bryan Federal Prison Camp in Bryan, Texas, as a result of my plea of guilty, in the United States District Court for the Western District of Oklahoma (Case No. CR 05-078), to one count of engaging in a monetary transaction in property derived from specified unlawful activity (money laundering).



2. While I serve the sentence imposed by the United States District Court for the Western District of Oklahoma, I am concurrently serving the sentence imposed by the District Court of Logan County, State of Oklahoma, as a result of my plea of guilty to fourteen (14) counts of Obtaining Money by False Pretenses (Case No. CF-2004-391).

3. The federal and state charges to which I pled guilty were in connection with a securities fraud I committed, doing business as Schubert and Associates, an unincorporated entity, in and from Crescent, Oklahoma, between at least January of 2000 and October of 2004.

4. In connection with the fraudulent sales of securities, I kited funds of more than Two Hundred Fifty Million Dollars (\$250,000,000) through Farmers & Merchants Bank (F&M) accounts that I controlled (F&M Accounts). This was done on a daily basis.

5. In connection with the fraudulent sales of securities, I represented to investors that I would invest their funds in a legitimate venture and return large profits resulting from the success of the investments. In many instances, I represented to investors that I would be trading options on their behalf.

6. The investment funds given directly to me by investors were commingled. None of the investment monies given to Schubert and Associates was invested on behalf of the investors, individually or collectively.

7. Schubert and Associates did not generate investment revenue. Investor funds, my personal funds and borrowed capital were the only sources of revenue for Schubert and Associates.

8. Payments of fictitious investment returns were necessary to create the appearance of legitimacy and success that enabled me to continue the securities fraud for as long as I did.

9. In the beginning, I used funds from my personal and business bank accounts and my husband's farm account of which I was an unauthorized user to pay fictitious investment returns to investors. As the balances in those accounts became inadequate to cover the returns I told investors that they had made, I borrowed and made payments from the commingled investor funds.

10. To further prevent the discovery of the truth about my activities, I devised a scheme involving a continual movement of funds between third party bank accounts that I controlled and the F&M Accounts. Relying on the float created by this activity, I paid fictitious investment returns with wires and checks that were drawn on insufficient and/or uncollected funds.

11. The third party bank accounts that I used extensively to continue the securities fraud were those of Lance Berry, Bob Mathews and Marvin Wilcox. Millions of dollars were transferred between the F&M Accounts and the accounts of Lance Berry, Bob Mathews and Marvin Wilcox.

12. Lance Berry, Bob Mathews and Marvin Wilcox turned over their checkbooks for accounts they maintained at NBanC. When I received the checkbooks, each check was signed in blank. I determined the amount of each distribution from the accounts and filled out the checks for deposit to my account.

13. I attempted to move funds in the same manner between accounts at BancFirst, one which was the Richard Schubert Farm Account which I was an

unauthorized user and the second a Schubert and Associates account and the accounts of Lance Berry, Robert Mathews and Marvin Wilcox; however, I was forced to stop this activity when BancFirst prohibited me from operating on uncollected funds.

14. On multiple occasions, John V. Anderson communicated with me about getting my F&M Accounts into a collected fund status.

15. In late 2003, Chad Johnson, an F&M officer, suggested to me that Lance Berry, Bob Mathews and Marvin Wilcox open accounts at F&M for their investment purposes in order to eliminate the uncollected funds issue in my F&M Accounts. Lance Berry, Bob Mathews and Marvin Wilcox opened F&M accounts through which I continued to transfer funds, without making investments on their behalf, for a period of less than 30 days. I stopped using the F&M accounts of Lance Berry, Bob Mathews and Marvin Wilcox because good or collected funds were not attainable.

16. F&M never did anything more to get my accounts into a collected funds status or to otherwise stop my activities.

17. If, at any time, F&M had refused to process the wires and/or to approve payment of the checks drawn on insufficient or uncollected funds, I could not have continued the fraud and the fraud would have abruptly stopped.

18. At some point, John V. Anderson and/or John Tom Anderson decided to reclassify my Schubert and Associates account from a personal account to a business account. As a result, F&M Bank collected service fees of more than \$80,000 on the uncollected balances in the account.

19. On many occasions, I was also allowed by F&M to use loan proceeds to pay fictitious investment returns when the stated purpose of the F&M loans was not

working capital for my investment business, and such loans were secured by fictitious collateral or collateral not actually owned by me.

20. F&M Bank also allowed me to liquidate a maturing certificate of deposit owned by Schubert Implement, an entity owned by Leland Schubert, and deposit the proceeds into my Schubert and Associates account. I had no signatory authority over any account related to Leland Schubert. I used the proceeds from the liquidation of the certificate of deposit to pay fictitious investment returns to investors.

21. At my unauthorized request, F&M Bank transferred funds from an F&M account for the estate of Leland Schubert to my F&M Account. I used the transferred funds to pay fictitious investment returns.

21. When I accepted their investment dollars, I did not tell investors: (a) that I was committing securities fraud; (b) that I was violating state and federal securities laws; (c) that I was not going to invest their monies; (d) that I was acting outside the scope of my association with the brokerage firm with whom I was registered; and/or (e) that I was orchestrating and perpetuating a ponzi scheme.

22. When I paid fictitious investment returns to investors, I did not tell them (a) that the payments were anything other than a return on their investments; (b) that the primary source of the payments was other investors' dollars; and/or (c) that the checks and wires were drawn on insufficient or uncollected funds.

23. I did not provide investors with Schubert and Associates account statements or any other record that accurately reflected the use of their investment dollars, the sources of the payments I made to them, or the current value of their investments. When investors asked for statements, I made up various excuses for the

lack of statements, such as the records were at my home. I also blamed the lack of statements on computer glitches or the incompetence of the brokerage firm with which I was affiliated.

24. When my illegal activities were ended through action by the Oklahoma Department of Securities on or about October 14, 2004, certain of the investors were "winners" and certain of the investors were "losers".

25. F&M bank officers Chad Johnson, Ed Stanton and Justin Tarrant were each on the "winners" end of my illegal activities and each referred numerous clients to me, even though F&M had its own investment division with its own advisor.

26. I hereby affirm that I am competent to make this Affidavit and that all of the foregoing is true and correct. I hereby affirm that I affix my signature to this document voluntarily and that no threat or promise of immunity or other assistance of any kind has been made by any person, to include the Administrator of the Oklahoma Department of Securities, any employee of the Oklahoma Department of Securities, and any member of the Oklahoma Securities Commission, to coerce the statements made herein.

Further Affiant sayeth not

  
Marsha Kay Schubert

Subscribed and sworn to before me this \_\_\_\_ day of February, 2009.

(NOTARIAL SEAL)

\_\_\_\_\_  
Notary Public

My Commission Expires:



FPC Bryan, Brazos County  
Subscribed and sworn before me this

25 day of FEBRUARY, 2009

  
Case Manager

Authorized by the Act of July 7, 1955, as amended, to administer oaths (18 USC Section 4004)

IN THE DISTRICT COURT OF LOGAN COUNTY  
STATE OF OKLAHOMA

STATE OF OKLAHOMA  
LOGAN COUNTY SS:  
FILED FOR RECORD ON

2004 NOV 15 PM 2:28

REJEANIA ZMEK  
COURT CLERK

BY \_\_\_\_\_ DEPUTY

Oklahoma Department of Securities )  
*ex rel.* Irving L. Faught, )  
Administrator, )

Plaintiff, )

v. )

Case No. CJ 2004-256

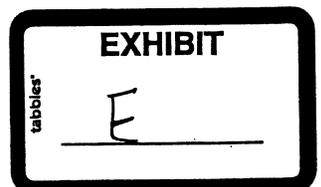
Marsha Schubert, an individual and )  
*dba* Schubert and Associates; )  
Richard L. Schubert, an individual and )  
*dba* Schubert and Associates; and )  
Schubert and Associates, )  
an unincorporated association, )

Defendants. )

**ORDER OF PERMANENT INJUNCTION**

This matter came on for hearing this 15<sup>th</sup> day of November, 2004,  
before the undersigned Judge of the District Court in and for Logan County, State of Oklahoma,  
upon the verified Petition for Permanent Injunction and Other Equitable Relief of the Plaintiff  
(Petition), pursuant to Section 1-603 of the Oklahoma Uniform Securities Act of 2004 (Act),  
Okla. Stat. tit. 71, §§ 1-101 through 1-701 (Supp. 2003), for violations of the Act and the  
Oklahoma Securities Act (Predecessor Act), Okla. Stat. tit. 71, §§ 1-413, 501, 701-703 (1991 &  
Supp. 2003).

The Department appears through its attorneys, Gerri Stuckey and Amanda Cornmesser.  
Defendants appear through their attorney, Mack Martin. The Receiver, Douglas L. Jackson,  
appears *pro se*.



After a review of the pleadings and evidence, this Court finds:

1. At all times material hereto, Defendants Marsha Schubert, individually and doing business as Schubert and Associates, and Schubert and Associates (collectively, "Defendants") engaged in the issuance, offer and/or sale of securities in and/or from Oklahoma to investors (Investors), in the nature of interests in an investment program (Investment Program Interests) in which Defendants represented they would invest Investor funds returning large profits to Investors.
2. The Investment Program Interests are securities as defined by Section 1-102 of the Act and Section 2 of the Predecessor Act.
3. The securities offered and sold by Defendants are not, and have not been, registered under the Act or the Predecessor Act. The securities have not been offered or sold pursuant to an exemption from registration pursuant to Section 1-201 of the Act or Section 401 of the Predecessor Act.
4. Defendant Marsha Schubert, by virtue of her efforts and activities in this state in effecting or attempting to effect transactions in securities, is an issuer agent of Schubert and Associates, as defined in Section 1-102 of the Act and Section 2 of the Predecessor Act. Defendant Marsha Schubert is not registered under the Act as an issuer agent. Defendant Schubert and Associates, an issuer as defined in Section 1-102 of the Act and Section 2 of the Predecessor Act, employed an agent who was not registered under the Act or the Predecessor Act to effect or attempt to effect purchases or sales of securities.
5. In its Petition, Plaintiff alleged that Defendants, in connection with the offer, sale, or purchase of securities, directly and indirectly, made untrue statements of material facts and omitted to state material facts necessary in order to make the statements made, in light of the

circumstances under which they were made, not misleading, in violation of subsection (2) of Section 1-501 of the Act and subsection (2) of Section 101 of the Predecessor Act.

6. In its Petition, Plaintiff alleged that Defendants, in connection with the offer, sale, or purchase of securities, and through the use of untrue statements of material facts and omissions of material facts, engaged in an act, practice, or course of business that has operated as a fraud or deceit upon Investors, in violation of subsection (3) of Section 1-501 of the Act and subsection (3) of Section 101 of the Predecessor Act.

7. Defendants have executed the Stipulation and Consent to Order of Permanent Injunction (Stipulation and Consent) attached hereto as Exhibit "A" and made a part hereof. The Plaintiff has no objection to the terms of the Stipulation and Consent and agrees to the entry of this Order.

8. There is a likelihood of future violations of the Act by Defendants if they are not enjoined.

Therefore, based on the pleadings, evidence, and the execution of the Stipulation and Consent, the Court finds that Plaintiff is entitled to the relief prayed for and that the Order of Permanent Injunction against Defendants be issued by agreement of the parties, and, therefore:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that a permanent injunction be and is hereby entered, forever enjoining and restraining Marsha Schubert, individually and doing business as Schubert and Associates, and Schubert and Associates from:

1. offering or selling any security in and/or from this state other than purchasing or selling securities on her own behalf and for her own account; and
2. transacting business in this state as broker-dealers or agents.

IT IS FURTHER ORDERED that Marsha Schubert, individually and doing business as Schubert and Associates, and Schubert and Associates pay restitution to Investors in a sum to be determined by this Court at the conclusion of the pending receivership in this matter.

IT IS FURTHER ORDERED that pending determination of the amount of restitution to be paid, the assets of Marsha Schubert, individually and doing business as Schubert and Associates, and Schubert and Associates continue to be frozen, as specified in the Temporary Restraining Order, Order Appointing Receiver, Order Freezing Assets and Order for Accounting issued by this Court on October 14, 2004 (Temporary Restraining Order).

IT IS FURTHER ORDERED that pending determination of the amount of restitution to be paid by Marsha Schubert, individually and doing business as Schubert and Associates, and Schubert and Associates, the Receiver shall continue to exercise that authority granted by the Temporary Restraining Order.

IT IS FURTHER ORDERED that this Court will retain jurisdiction of this matter for the purpose of the administration of the receivership and the enforcement of this Order of Permanent Injunction and the Stipulation and Consent.

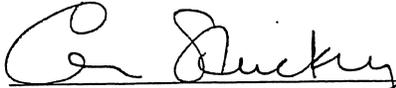
IT IS SO ORDERED.

Dated this 15<sup>th</sup> day of November, 2004.

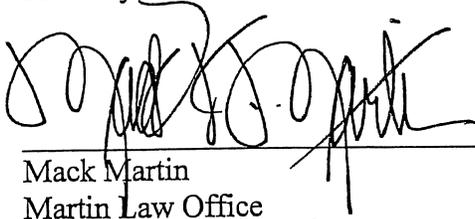
DONALD L. WORTHINGTON

\_\_\_\_\_  
DISTRICT COURT JUDGE

Approved as to form:



Gerri L. Stuckey, OBA #16732  
Amanda Cornmesser, OBA #20044  
Oklahoma Department of Securities  
120 N. Robinson, Suite 860  
Oklahoma City, OK 73102  
(405) 280-7700  
Attorneys for Plaintiffs



Mack Martin  
Martin Law Office  
119 N. Robinson, Suite 360  
Oklahoma City, OK 73102  
Attorney for Defendants Marsha Schubert,  
individually and *dba* Schubert and Associates,  
and Schubert and Associates



Douglas L. Jackson *Brad Davenport* OBA 18687  
Gungoll, Jackson, Collins, Box & Devoll, P.C.  
323 W. Broadway  
Enid, OK 73701  
(580) 234-1284  
Receiver  
*Counsel for Receiver*

**IN THE DISTRICT COURT OF LOGAN COUNTY  
STATE OF OKLAHOMA**

Oklahoma Department of Securities )  
*ex rel.* Irving L. Faught, )  
Administrator, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
Marsha Schubert, an individual and )  
*dba* Schubert and Associates; )  
Richard L. Schubert, an individual and )  
*dba* Schubert and Associates; and )  
Schubert and Associates, )  
an unincorporated association, )  
 )  
Defendants. )

Case No. CJ 2004-256

**STIPULATION AND CONSENT TO ORDER OF PERMANENT INJUNCTION**

Defendants Marsha Schubert, individually and doing business as Schubert and Associates, and Schubert and Associates (collectively, "Defendants"), without admitting or denying any violation of the Oklahoma Uniform Securities Act of 2004 (Act), Okla. Stat. tit. 71, §§ 1-101 through 1-701 (Supp. 2003), or the Oklahoma Securities Act (Predecessor Act), Okla. Stat. tit. 71, §§ 1-413, 501, 701-703 (1991 & Supp. 2003), stipulate to the following facts and consent to the follow undertakings:

**Stipulations:**

Defendants hereby stipulate as follows:

1. The Oklahoma Department of Securities (Plaintiff) is the proper party to bring this action seeking the relief requested in the Petition for Permanent Injunction and Other Equitable Relief (Petition) filed in this matter.

**EXHIBIT "A"**

2. Defendants are subject to the jurisdiction of this Court by proper service of the Petition and their appearance in this matter.

3. Defendants engaged in the issuance, offer, and/or sale of securities in and/or from Oklahoma to investors (Investors), in the nature of interests in an investment program (Investment Program Interests) in which Defendants represented they would invest Investor funds returning large profits to Investors. The Investment Program Interests are securities as defined by Section 1-102 of the Act and Section 2 of the Predecessor Act.

4. Defendants admit to the application of the Act and the Predecessor Act to the offer and sale of securities in and/or from Oklahoma referenced in paragraph 3 above.

Undertakings:

Defendants hereby undertake as follows:

1. Defendants consent to the entry of an order of permanent injunction in the form attached as Exhibit "A" hereto and made a part of this Stipulation and Consent.

2. Defendant Marsha Schubert consents to the entry of an administrative order barring her from association with broker-dealers and investment advisers in any capacity in the form attached as Exhibit "B" hereto and made a part of this Stipulation and Consent.

3. Defendants state that this Stipulation and Consent is entered into voluntarily and that no threat or promise of immunity of any kind has been made by Plaintiff, the Oklahoma Securities Commission, the Administrator of the Oklahoma Department of Securities, or any employee of the Oklahoma Department of Securities, to coerce agreement with this Stipulation and Consent.

4. Defendants waive any right to appeal from the order of permanent injunction.

5. Defendants agree that this Stipulation and Consent and all provisions hereof shall be incorporated by reference into the order of permanent injunction.

6. Defendants agree to pay restitution to Investors in a sum to be determined by this Court at the conclusion of the pending receivership in this matter.

7. Defendants agree that pending determination of the amount of restitution to be paid by Defendants, the assets of Defendants will continue to be frozen, as specified in the Temporary Restraining Order, Order Appointing Receiver, Order Freezing Assets and Order for Accounting issued by this Court on October 14, 2004 (Temporary Restraining Order).

8. Defendants agree that pending determination of the amount of restitution to be paid by Defendants, the Receiver shall continue to exercise that authority granted by the Temporary Restraining Order.

9. Defendants understand that Plaintiff will take action as authorized by law for any Defendant's failure to comply with the terms of this Stipulation and Consent in any material respect or for any future violation of the Act.

10. Defendants agree to the presentation to the Court of this Stipulation and Consent, executed by each Defendant, and to the entry of the order of permanent injunction, in the form attached as Exhibit "A", without further notice.

11. Defendant Marsha Schubert agrees to the presentation to the Administrator of the Oklahoma Department of Securities of this Stipulation and Consent and to the entry of the administrative order barring her from association with broker-dealers and investment advisers in the form attached as Exhibit "B", without further notice.

12. Defendants consent to the Court's retention of jurisdiction of this matter for all purposes including, but not limited to, administration of the receivership and enforcement of this Stipulation and Consent.

**IN WITNESS WHEREOF**, the Defendants have executed this Stipulation and Consent as of the date and year set forth below their signatures hereto.

Marsha Schubert, Individually and  
*dba* Schubert and Associates:

Date: Marsha Schubert 11-4-04

Address: PO Box 314  
Grescent, Okla 73028

Schubert and Associates:

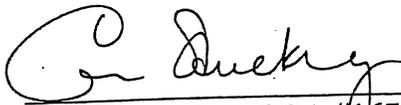
By: Marsha Schubert

Title: Sole operator

Date: 11-4-04

Address: PO Box 314  
Grescent, Ok 73028

Approved as to form and substance:



---

Gerri L. Stuckey, OBA #16732  
Amanda Cornmesser, OBA #20044  
Oklahoma Department of Securities  
120 N. Robinson, Suite 860  
Oklahoma City, OK 73102  
(405) 280-7700  
Attorneys for Plaintiff



---

Mack Martin  
Martin Law Office  
119 N. Robinson, Suite 360  
Oklahoma City, OK 73102  
Attorney for Defendants Marsha Schubert,  
individually and dba Schubert and Associates,  
and Schubert and Associates

---

Douglas L. Jackson  
Gungoll, Jackson, Collins, Box & Devoll, P.C.  
323 W. Broadway  
Enid, OK 73701  
(580) 234-1284  
Receiver

IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA

OKLAHOMA DEPARTMENT of SECURITIES  
ex rel. Irving L. Faught,  
Administrator,

Plaintiff,

vs. CASE NO. CJ-2006-3311  
FARMERS & MERCHANTS BANK;  
FARMERS & MERCHANTS BANCSHARES,  
INC.; JOHN V. ANDERSON; and  
JOHN TOM ANDERSON,

Defendants,

and

ROBERT LYNN POURCHOT, Trustee  
of the Robert Lynn Pourchot  
Trust, et al.,

Intervenors.

DEPOSITION OF LENARD BRISCOE  
TAKEN ON BEHALF OF THE DEFENDANTS  
ON MARCH 18, 2009, BEGINNING AT 9:15 A.M.  
IN OKLAHOMA CITY, OKLAHOMA

APPEARANCES:

On behalf of the PLAINTIFF:  
Ms. Amanda Cornmesser  
Ms. Melanie Hall  
STATE OF OKLAHOMA Department of Securities  
First National Center, Suite 860  
120 North Robinson  
Oklahoma City, Oklahoma 73102  
(405) 280-7700

(APPEARANCES CONTINUED ON PAGE 2)

REPORTED BY: Laura L. Robertson, CSR, RPR

identification)

CROSS EXAMINATION

BY MS. CORNMESSER:

Q. Mr. Briscoe, I'm Amanda Cornmesser, I'm an attorney with the Department of Securities, with me today is Melanie Hall, with the department. We just have a few quick questions to ask you.

Did Marsha Schubert tell you that she would invest your funds legitimately?

A. The first funds she did.

Q. What did she tell you with the checks written to Schubert & Associates?

A. That she was going to buy stocks.

Q. Okay.

A. Best of my knowledge.

Q. Was it your understanding that it also would be legitimate, that she would actually invest?

A. She didn't -- I don't recall if she said it that way.

Q. But she did say it the first time?

A. The first 60,000, I believe that she had.

Q. Did she tell you that she could make money for you on your investments?

A. As far as I know.

Q. Would you have invested with Marsha Schubert

if you had known she was committing securities fraud?

A. No.

Q. Would you have invested with Marsha Schubert if you had known she was violating state and/or federal laws?

A. No.

Q. Would you have invested with Marsha Schubert if you had known she never had any intent to invest your funds?

A. No, ma'am.

Q. Would you have invested with Marsha Schubert if you had known she was acting outside of the scope of AXA or Wilbanks?

MR. RYAN: Object to the form. Go ahead.

THE WITNESS: No, I wouldn't invest.

Q. (BY MS. CORNMESSER) Would you have invested with her -- first let me ask you this. Do you know what the term is Ponzi scheme?

A. I have been reading about it in the paper. And I guess that's what she was running; right?

Q. That's right. Would you have invested with her if you had known she was perpetuating a Ponzi scheme?

A. No, ma'am.

Q. Are you familiar with the term uncollected

A. Above.

Q. So in connection with that, are you the one that told her you weren't going to lend the money?

A. I didn't tell her, no.

Q. Did you have any -- direct communication with her?

A. No.

Q. Is that the only contact that you had had with her prior to her calling you?

A. Uh-huh.

Q. Had anyone recommended her to you?

A. Yes, a couple of guys. Marvin Wilcox and Lance Barry, they told me how much money they had made with her.

Q. How did you know Mr. Barry and Mr. Wilcox?

A. Marvin Wilcox worked at Kingfisher Bank and Trust at that time, and Lance Barry owned the ASC, Cementing in Crescent, done a lot of work for me.

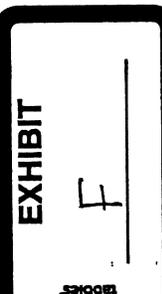
Q. Okay. So Mr. Barry had worked for you and Mr. Wilcox had worked in a bank in which you were either the owner or part owner?

A. I was on the board there.

Q. On the board.

A. Part owner, too.

Q. And tell me, so she calls you. Do you have





IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA

OKLAHOMA DEPARTMENT of SECURITIES  
ex rel. Irving L. Faught,  
Administrator,

Plaintiff,  
vs. CASE NO. CJ-2006-3311  
FARMERS & MERCHANTS BANK;  
FARMERS & MERCHANTS BANCSHARES,  
INC.; JOHN V. ANDERSON; and  
JOHN TOM ANDERSON,

Defendants,

and

ROBERT LYNN FOURCHOT, Trustee  
of the Robert Lynn Pourchot  
Trust, et al.,

Intervenors.

DEPOSITION OF STEPHEN E. POLLARD  
TAKEN ON BEHALF OF THE DEFENDANTS  
ON MARCH 19, 2009, BEGINNING AT 9:15 A.M.  
IN OKLAHOMA CITY, OKLAHOMA

APPEARANCES:

On behalf of the PLAINTIFF:

Ms. Amanda Cornmesser  
Ms. Melanie Hall  
STATE OF OKLAHOMA Department of Securities  
First National Center, Suite 860  
120 North Robinson  
Oklahoma City, Oklahoma 73102  
(405) 280-7700

(APPEARANCES CONTINUED ON PAGE 2)

REPORTED BY: Laura L. Robertson, CSR, RPR

A. I don't know when -- I don't remember --  
recall when they locked her up, but it was somewhere  
in October or November somewhere.

Q. So you're telling me you didn't really know  
anything about right about the time the office was  
closed?

A. No, because we sure wouldn't have put the  
last \$100,000 or whatever in there.

Q. Right.

MR. RYAN: I don't have any further  
questions. These ladies down here may have some  
questions for you.

CROSS EXAMINATION

BY MS. CORNMESSER:

Q. Mr. Pollard, I'm Amanda Cornmesser with the  
Securities Department, along with Mrs. Hall. I just  
have a few questions for you.

Did Marsha Schubert tell you that she would  
invest your funds in a legitimate venture?

A. Yes.

Q. If you had known that Marsha Schubert was  
committing securities fraud, would you have invested  
with her?

A. No way.

Q. If you had known Marsha Schubert was

violating state and/or federal laws would you have  
invested with her?

A. No.

Q. Have you ever heard of the term Ponzie  
scheme?

A. Yes.

Q. What is your understanding of a Ponzie  
scheme?

A. Well, the first ones in get a little money  
back, and the last ones in lose it all.

Q. If you had known Marsha was operating a  
Ponzie scheme, would you have invested with her?

A. Not at all.

Q. If you had known that the monies that other  
folks were getting from Marsha Schubert were  
fictitious, would you have invested with her?

A. No.

Q. If you had known that the monies Marsha gave  
to the investors were on uncollected funds, would you  
have invested with her?

MR. RYAN: Object to the form of the  
question.

THE WITNESS: No.

Q. (BY MS. CORNMESSER) If you had known that  
the investment returns given to the investors were on

insufficient funds, would you have invested with her?

MR. RYAN: Object to the form of the  
question.

THE WITNESS: No.

Q. (BY MS. CORNMESSER) If you had known that  
Marsha was operating a check kite, would you have  
invested with her?

MR. RYAN: Object to the form of the  
question.

THE WITNESS: No.

MS. CORNMESSER: I don't think I have any  
further questions. Thank you.

MR. RYAN: Just a moment.

(Discussion held off the record)

REDIRECT EXAMINATION

BY MR. RYAN:

Q. If you had known, sir, that AXA had come  
in -- you know who I'm talking about; right?

A. Yes, sir.

Q. If AXA had come into Marsha's office and  
conducted an investigation in April of '04, and they  
had found that she had forged documents and wanted to  
terminate her, but then ended up letting her resign,  
and then that's when she went with Wilbanks?

A. Okay.

EXHIBIT

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everybody was talking about how, the big money she was making them. So we finally just talked to her and she said she would invest the money.

Q. Okay. Do you know who it was that, when you said everybody was talking about her and her success, do you know who it was that you did speak to about Marsha's success?

A. I had several people tell me that I should invest with them.

Q. Do you know --

A. Bob Mathews was one, Marvin Wilcox. Several people I know in the community.

Q. All right. Where do you bank, sir, or where did you bank back in the time frame of 2003 and 2004?

A. Well, the LLC banks in Enid with Chisholm Trail Farm Credit.

Q. Okay.

A. And personally, I have a personal bank account at Kingfisher Bank -- well, it is BancFirst now.

Q. Okay. How about your dad, where does he bank?

A. The same thing.

Q. Same way as you do?

A. Uh-huh.

IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA

OKLAHOMA DEPARTMENT of SECURITIES  
ex rel. IRVING L. FAUGHT,  
Administrator,

Plaintiff,

vs.

CASE NO. CJ-2006-3311

FARMERS & MERCHANTS BANK;  
FARMERS & MERCHANTS BANCSHARES,  
INC.; JOHN V. ANDERSON; and  
JOHN TOM ANDERSON,

Defendants,

and

ROBERT LYNN POURCHOT, Trustee  
of the Robert Lynn Pourchot  
Trust, et al.,

Intervenors.

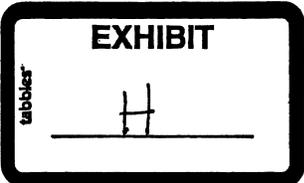
DEPOSITION OF ROBERT MATHEWS  
TAKEN ON BEHALF OF THE DEFENDANTS  
ON MARCH 17, 2009, BEGINNING AT 9:15 A.M.  
IN OKLAHOMA CITY, OKLAHOMA

APPEARANCES:

On behalf of the PLAINTIFF:  
Ms. Amanda Cornmesser  
Ms. Melanie Hall  
STATE OF OKLAHOMA Department of Securities  
First National Center, Suite 860  
120 North Robinson  
Oklahoma City, Oklahoma 73102  
(405) 280-7700

(APPEARANCES CONTINUED ON PAGE 2)

REPORTED BY: Laura L. Robertson, CSR, RPR



1 Q. Did Marsha Schubert ever tell you she was  
2 acting outside the scope of AXA?

3 A. No.

4 Q. Did Marsha Schubert ever tell you that the  
5 payments given by her to your parents' trust were  
6 anything but a return on the investments?

7 A. No.

8 Q. Did Marsha Schubert ever tell you the  
9 primary source of payments was other investors' money?

10 A. No.

11 Q. Did Marsha Schubert ever tell you that the  
12 checks and wires into the trusts were on uncollected  
13 funds?

14 A. No.

15 Q. On insufficient funds?

16 A. No.

17 Q. If you had known that Marsha Schubert would  
18 not invest the funds legitimately for the trust, would  
19 you have allowed her to have the money?

20 A. No.

21 Q. If you had known that Marsha Schubert was  
22 committing securities fraud, would you have allowed  
23 her to have the money for the trust?

24 A. No.

25 Q. Do you hold Marsha Schubert ultimately

IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA

OKLAHOMA DEPARTMENT of SECURITIES  
ex rel. Irving L. Faught,  
Administrator,

Plaintiff,

CASE NO. CJ-2006-3311

vs.  
FARMERS & MERCHANTS BANK;  
FARMERS & MERCHANTS BANCSHARES,  
INC.; JOHN V. ANDERSON; and  
JOHN TOM ANDERSON,

Defendants,

and

ROBERT LYNN FOURCHOT, Trustee  
of the Robert Lynn Pourchot  
Trust, et al.,

Intervenors.

DEPOSITION OF LOREN POLLARD  
TAKEN ON BEHALF OF THE DEFENDANTS  
ON MARCH 19, 2009, BEGINNING AT 10:00 A.M.  
IN OKLAHOMA CITY, OKLAHOMA

APPEARANCES:

On behalf of the PLAINTIFF:

Ms. Amanda Cornmesser  
Ms. Melanie Hall  
STATE OF OKLAHOMA Department of Securities  
First National Center, Suite 860  
120 North Robinson  
Oklahoma City, Oklahoma 73102  
(405) 280-7700

(APPEARANCES CONTINUED ON PAGE 2)

REPORTED BY: Laura L. Robertson, CSR, RFR

A. I suppose so. I mean, you know, we did a  
lot of banking, and I think it goes right in right  
then, I mean, to your account.

Q. Okay.

MR. RYAN: That's all I have.

CROSS EXAMINATION

BY MS. CORNMESSER:

Q. Mr. Pollard, what did Marsha tell you about  
what investment she was going to make for you?

A. It was mostly she just said she was trading  
options.

Q. Okay. Did she tell you it would be a  
legitimate venture?

A. Well, I don't know if I ever asked her if it  
was a legitimate venture, but she just said she was  
trading options and doing real well at it and was  
making money. And I assumed that was what was  
happening.

Q. If you had known that she was committing  
securities fraud, would you have invested with her?

A. Oh, man, no.

Q. If you had known that she was violating  
state and federal securities laws would you have  
invested with her?

A. Uh-uh.

Q. Do you know what the term Ponzi scheme  
means? Ponzi scheme?

A. Yes.

Q. What is your understanding of that?

A. Well, they just take the investors' money  
and give it to the earlier ones, and there is never  
any trading really taking place. They just keep  
paying the earlier investors, and then they get more  
investors to keep it going.

Q. Would you have given her money if you had  
known she was operating a Ponzi scheme?

A. Uh-uh, I wouldn't have even went close.

Q. Mr. Pollard, did you ever serve on a bank  
board?

A. Yes.

Q. What bank was that?

A. At the time it was Kingfisher Bank & Trust.

Q. How many years did you serve on the board?

A. I don't know, 15, maybe. I really don't  
know.

Q. Do you remember approximately the years that  
you were there?

A. Yes. About the time they sold the bank to  
the First Capital, or First State Bank, or BancFirst.  
Five, six, seven, maybe ten years ago, I don't know.

1 options account?

2 A No, ma'am.

3 Q Were you aware Marsha Schubert had a checking  
4 account at F&M Bank?

5 A Yes, ma'am.

6 Q And do you know what the name of the checking  
7 account was?

8 A Schubert & Associates.

9 Q Did you understand that to be a trading account,  
10 that that's where the money was pooled and then she was buying  
11 options?

12 A As far as I know, yeah.

13 Q Do you know if she used that account for any other  
14 reason?

15 A Some of the proceeds from the loans went in there  
16 and whatnot. But other than that, no. I mean, I don't know  
17 how that was conducted.

18 Q Did you attend the morning loan meetings at F&M  
19 Bank?

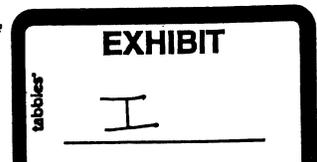
20 A Yes, ma'am.

21 Q How often were they held?

22 A Every day.

23 Q Every day. And before October of 2004, who was  
24 present in those meetings?

25 A Before October of 2004?







3. I have been a director of Central National Bank & Trust Company of Enid, Oklahoma, for approximately eight (8) years. I have served on the loan committee since my appointment to that board, and am currently serving as chairman of the loan committee.

4. From 1988 to 1994, I served as a member of the Oklahoma Securities Commission.

5. In October of 2004, I was appointed the Receiver for the assets of Marsha Schubert and Schubert & Associates in Logan County District Court Case CJ-2004-256.

6. As Receiver, I hired Baird Kurtz Dodson LLP (BKD) to perform a review of all bank accounts maintained or controlled by Marsha Schubert. BKD obtained records from a variety of sources, many of which came from Farmers and Merchants Bank (F&M Bank).

7. I have reviewed the reports prepared by BKD relating to the bank accounts maintained and controlled by Marsha Schubert.

8. Marsha Schubert was routinely given immediate funds credit for deposits made into her account(s) at F&M Bank over a period of years. As a result, she was able to perpetuate her securities fraud.

9. I am of the opinion that Marsha Schubert operated a scheme of check kiting through her accounts at F&M Bank. The operation of the check kite was illegal and was not consistent with sound, reasonable banking practice on the part of F&M Bank.

10. Instead of stopping Marsha Schubert's practice of operating on uncollected funds in very significant amounts, F&M Bank started to collect fees and/or

interest on her uncollected fund balances. In twenty-eight years of practicing law in Oklahoma I have never encountered a bank charging interest and/or fees for allowing a customer to operate on uncollected funds.

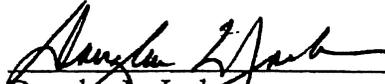
11. The following list contains the names of the investors with remaining losses:

**Short Investors**

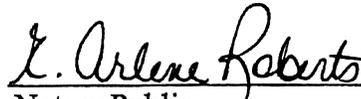
Abemethy, Corene	Mathews, WM Property Trust
Allen, Ted & Jeanne	Matthews, Betty Trust
Avery, Lloyd	Matthews, William James
Bell, Brent	Phillips, Jim & Jean
Blair Minerals	Pollard, Loren & Marj
Blair, Craig	Pollard, Loren & Steve Farms
Blair, Kent	Porkchop Trust
Blair, Tim	Pourchot Investments(Geraldine)
Boren, Brent	Pourchot, Phil
Boren, Ken	Pourchot, Robert
Briscoe, Lenard	Reynolds, Richard & Annenda
Broughton, Shirley	Richards, Harold
Clough, Ron	Sanders, David & Mary
Crandall, & Sanders	Sanders, Steve & Vicki
Dillingham, Keith	Schnorr, Bennie
Edgar, Tom & Karen	Schubert, Richard
Elmore, Jason & Jennie	Schultz, Debra
Floyd, Coy & Kay	Shelite, Beverly
Ford, Steven	Shelley, Lloyd & Bonita
Glover, Jamie	Stafford, Jared
Gunn, Alma	Talley, Robert and Pam
Hall, John	Triplett, Larry
Halverson, Pamela	Vance, John
Ham, Curtis & Opal	Walker, Bob & Kathy
Harris, Joel	Walker, J T (Jackson)
Hedrick, Stuart & Helen	Walker, Jack & Betty
Henthron, Mike	Walker, Ricky
Holthus, Richard & JoAnn	Wallace, Terry & Langley, Terry
Jackson, Joyce	Ward, Linda
James, Randy & Lori	Webb, Donna
Kinsey, Linda	Will Foundation
Kretchmar, Randy	Williams, Larry
Liebl, Charles & Joyce	Yenzer, Geneva

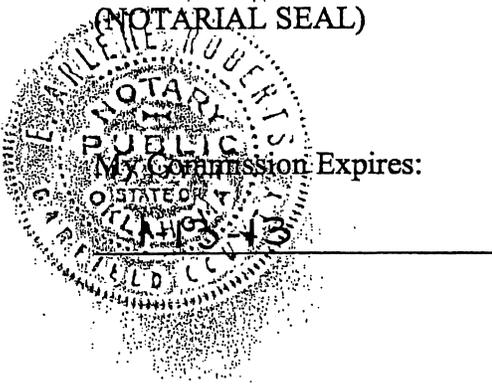
12. Following two distributions from the receivership estate and recoveries from third parties, the total remaining loss for the Short Investors listed above is \$3,558,026.56.

FURTHER AFFIANT SAYETH NOT.

  
\_\_\_\_\_  
Douglas L. Jackson

Subscribed and sworn to before me this 7<sup>th</sup> day of May, 2009.

  
\_\_\_\_\_  
Notary Public



IN THE DISTRICT COURT OF LOGAN COUNTY

STATE OF OKLAHOMA

OKLAHOMA DEPARTMENT OF SECURITIES, ex rel. IRVING L. FAUGHT, Administrator, Plaintiff, vs. MARSHA SCHUBERT, an individual and d/b/a SCHUBERT & ASSOCIATES; and SCHUBERT & ASSOCIATES, an unincorporated association, Defendant. CASE NO. CJ-2004-256

DEPOSITION OF CHAD JOHNSON

taken on behalf of the Plaintiff

on April 7, 2005

in Enid, Oklahoma

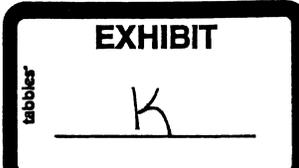
WORD FOR WORD REPORTING, L.L.C. 2220 FIRST NATIONAL CENTER 120 NORTH ROBINSON AVENUE OKLAHOMA CITY, OKLAHOMA 73102

Reported by: MARTI M. MARTIN, C.S.R.

Q Right. A Well -- Q Let's say from 2001 to 2004. A Okay. Myself, John Tom, John V., Ed, and Justin. Q Okay. A And I can't remember when we opened the Guthrie branch. But when Barry was over there, Barry was in there as well. Q And Melissa Moon did not attend those? A Occasionally she would be in there, not every day. Q Why not? A I don't really know. Most of the time it was just our loan committee meeting. Q Okay. Was Marsha Schubert or the activity in her accounts ever discussed in those morning loan meetings? A Every now and again, yes. Q Tell me what the discussion was. A There was one discussion when the uncollected funds came about. Q What was discussed about that? A Just that it was uncollected, and that John was going to look into it. Q John V.? A Yes. I'm sorry. Q Just one time you remember?

options account? A No, ma'am. Q Were you aware Marsha Schubert had a checking account at F&M Bank? A Yes, ma'am. Q And do you know what the name of the checking account was? A Schubert & Associates. Q Did you understand that to be a trading account, that that's where the money was pooled and then she was buying options? A As far as I know, yeah. Q Do you know if she used that account for any other reason? A Some of the proceeds from the loans went in there and whatnot. But other than that, no. I mean, I don't know how that was conducted. Q Did you attend the morning loan meetings at F&M Bank? A Yes, ma'am. Q How often were they held? A Every day. Q Every day. And before October of 2004, who was present in those meetings? A Before October of 2004?

A I just suspected, yeah. Q Did you ever suggest to Marsha that Berry, Matthews, and Wilcox should open a checking account? A I told her that she could, yes, and that would cut down on the uncollected funds. Q Tell me about that conversation. Did you call her? A I'm not real sure. Q Did someone talk about it in a meeting? A No. I don't remember all that much, other than the fact that Marsha and I were talking about it one day about her uncollected funds and I said, Well, one way to eliminate that is to open the accounts here and that would eliminate the uncollected funds or have the money wired, either way. Q So was she going to open the accounts for those three men, or were they going to come in and open up accounts? A I assume that they were going to come in. Q Okay. And did they? A You know, I kind of want to think they did, but I don't know if they ever used them or if they did. I'm not for certain on that. Q Were you aware that Marsha Schubert was depositing on a daily basis checks from Matthews, Berry, and Wilcox? A Uh-huh. Q Could you say yes or no? A Yes.



1 judgment?  
2 A Basically, yeah.  
3 Q Did you tell Michael Brennan about your options  
4 account with Marsha Schubert?  
5 A I discussed it very little with him, yes.  
6 Q What did you tell him?  
7 A Basically that I had an options account up there and  
8 that she was making me money.  
9 Q Did he ask any questions about it?  
10 A We got on the deal where I told him I wasn't getting  
11 a statement, yes.  
12 Q You were a little concerned you weren't getting a  
13 statement.  
14 A Well, I just had told him that. He had asked about  
15 it.  
16 Q You told Don Spicer and you told Michael Brennan, so  
17 you were obviously concerned you weren't getting a statement.  
18 A I don't know if I was concerned. I was wondering  
19 why I wasn't, yeah.  
20 Q Okay. So you're telling him that, and then what  
21 happened?  
22 A Nothing really. I mean, he said it could be a Ponzi  
23 scheme.  
24 Q And did you ask him why?  
25 A No. Number one, I didn't know what a Ponzi scheme

1 was to begin with.  
2 Q Did he explain it to you?  
3 A No, ma'am.  
4 Q He just said it's a Ponzi scheme and walked off?  
5 A No. He said it sounds like it could be. Like I  
6 said, nobody had any proof of it.  
7 Q But you didn't know what it was, so how do you know  
8 what proof you needed?  
9 A Well, he didn't have any. He didn't know. He just  
10 said it could be.  
11 Q Was this last year?  
12 A I believe so.  
13 Q Why did you even ask him about it in the first  
14 place?  
15 A I'm not real sure. It possibly could have been when  
16 he was writing the memo on it and was asking about it. I  
17 mean, I don't know. I don't know how we ended up getting on  
18 the subject.  
19 Q Did you tell anybody about the conversation?  
20 A Actually, I think I may have talked with John Tom  
21 and John V. about it, but I can't be real sure.  
22 Q What do you think you told them?  
23 A You know, just that Mike kind of thought it might be  
24 a Ponzi scheme. Like I said, I'm not sure what exactly was  
25 discussed.

1 A Yes, sir.  
2 Q Okay. Now, tell me about the discussions that the  
3 loan committee had regarding the checks that were being  
4 deposited into Schubert & Associates.  
5 A Well, I really can't. I don't remember them in  
6 detail. Mainly John V. brought it up and said, Hey, you know,  
7 this is an uncollected balance in this account. Basically  
8 that discussion was between him and Marsha. I believe that he  
9 went to the tellers and wanted to kind of look at some of the  
10 deposits that she was bring in after that. Whether he did or  
11 he didn't, I'm not for sure.  
12 Q Now, you were -- oh, go ahead. Excuse me.  
13 A No, I'm done.  
14 Q Now, you were a member of the committee. Did you  
15 consider it your individual responsibility as a member of the  
16 committee to investigate that particular situation where  
17 Mr. Anderson said that Schubert & Associates was operating on  
18 uncollected funds?  
19 A No, sir, I did not.  
20 Q Why not?  
21 A Because he said he was going to take care of it.  
22 Q So you thought if one person on the committee said  
23 they were going to take care of it, that would relieve you of  
24 your responsibilities as a member of that committee?  
25 A Absolutely.

1 IN THE DISTRICT COURT OF LOGAN COUNTY  
2 STATE OF OKLAHOMA

3 OKLAHOMA DEPARTMENT OF )  
4 SECURITIES, ex rel. IRVING L. )  
5 FAUGHT, Administrator, )  
6 Plaintiff, )  
7 vs. ) CASE NO. CJ-2004-256  
8 MARSHA SCHUBERT, an individual )  
9 and d/b/a SCHUBERT & ASSOCIATES; )  
10 and SCHUBERT & ASSOCIATES, an )  
11 unincorporated association, )  
12 Defendant. )

11 \* \* \* \* \*

12 VIDEOTAPED DEPOSITION OF ED STANTON

13 taken on behalf of the

14 Plaintiff

15 on April 6, 2005

16 in Oklahoma City, Oklahoma

17 \* \* \* \* \*

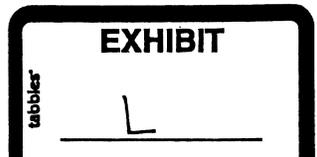
18  
19  
20  
21 WORD FOR WORD REPORTING, L.L.C.  
22 2220 FIRST NATIONAL CENTER  
23 120 NORTH ROBINSON AVENUE  
24 OKLAHOMA CITY, OKLAHOMA 73102

25 Reported by: MARTI M. MARTIN, C.S.R.

1 A Transfers, I'm not sure how that went.  
2 Q Did you ever approve any transfers that you  
3 remember?  
4 A Don't know that I remember any. You mean transfers  
5 from one of her accounts to another?  
6 Q Right.  
7 A If -- I'm assuming if she requested a transfer, she  
8 could get a transfer.  
9 Q Okay. Were you aware that John V. Anderson was  
10 asking to see her deposits?  
11 A Other than he had meetings with her privately.  
12 Q Did he ever discuss those meetings with you?  
13 A Just between he and John Tom basically was the  
14 conversation in the morning meeting and that he would handle  
15 it.  
16 Q He would handle what?  
17 A Marsha and her accounts.  
18 Q And what was to be handled?  
19 A Whatever resolution he thought was an issue. I  
20 don't know. Whatever issue there was that needed a  
21 resolution.  
22 Q What kind of issues would there have been?  
23 A If there was insufficient funds or uncollected  
24 funds.  
25 Q How did they know there were uncollected funds if

1 the Oklahoma State Banking Department as a bank examiner in  
2 operations and basic lending, lending review. And then from  
3 there, from January 1st of '94 until March 26th of '04, I was  
4 a senior vice president at Farmers & Merchants Bank, Crescent,  
5 Oklahoma.  
6 Q What was your -- what all were you duties as senior  
7 vice president?  
8 A Basically lending. I sat on the loan committee. I  
9 was secretary to the board of directors. I was the compliance  
10 officer, internal control officer, security officer, asset  
11 liability management committee, loan committee, investment  
12 committee. There's probably more, I just can't recall.  
13 Q Who was your supervisor when you were senior vice  
14 president at F&M?  
15 A John Tom Anderson, president and CEO; and John V.  
16 Anderson, chairman of the board.  
17 Q And who did you supervise, if anyone?  
18 A I really didn't supervise anyone. I had two younger  
19 gentlemen that worked with us that were -- had been there less  
20 time that were supervisors, too, in our bank.  
21 Q And who was that?  
22 A Justin Tarrant and Chad Johnson.  
23 Q I just want to go through some of the titles that  
24 you named off when you were talking about your duties as  
25 senior vice president, and also titles that you may not have

1 Q Did you do anything socially with Lance Berry?  
2 A No.  
3 Q Did you socialize with Marvin Wilcox?  
4 A No.  
5 Q Any business relations with Mr. Wilcox?  
6 A No.  
7 Q Did you ever see Mr. Berry, Mr. Wilcox, or  
8 Mr. Matthews make deposits for Marsha Schubert at F&M Bank?  
9 A Never did.  
10 Q Were you aware that Marsha Schubert was depositing  
11 on a daily basis checks from Mr. Matthews, Mr. Berry, and  
12 Mr. Matthews?  
13 A Those were part of those three accounts that we  
14 talked about that John was monitoring.  
15 Q Okay, I'm confused because I didn't -- I thought you  
16 said they didn't have checking accounts.  
17 A Not when I -- not in the beginning.  
18 Q Okay. But they --  
19 A I thought those were Marsha's accounts.  
20 Q Marsha had a Schubert & Associates account there.  
21 A Okay.  
22 Q So when you're saying that --  
23 A I thought she had three trading accounts with  
24 them -- or one trading for three of them was my understanding.  
25 I don't know.



1 published, I mean, I'm going to keep it.

2 MS. CORNMESSER: It's not published.

3 MR. TIPPENS: Well, you've handed it to me,  
4 and I just want to be aware of what you have  
5 placed in front of people here. That's the only  
6 way I have a record of knowing that.

7 MS. CORNMESSER: Okay. They came from the  
8 bank.

9 MR. TIPPENS: I understand that. But, I  
10 mean, because they come from the bank and I  
11 represent the bank, I'm entitled to the  
12 information.

13 MS. CORNMESSER: Okay.

14 Q (By Ms. Cornmesser) In your opinion, did Schubert &  
15 Associates have a negative average collected balance for a  
16 long time?

17 A I'm not sure the time period. It was longer than  
18 normal. I would say longer than days.

19 Q So usually the bank would allow a few days for an  
20 uncollected balance?

21 A It depends on the customer.

22 Q Are you aware if John Tom Anderson ever spoke to  
23 anyone at NBC Bank about Marsha Schubert's --

24 A I think that they made some phone calls just to  
25 inquire.

1 Q Who made the calls?

2 A I don't know.

3 Q From NBC to John Tom or John Tom to NBC?

4 A Could have been both.

5 Q Okay.

6 A I know that was discussed in part of the morning  
7 meeting about correspondence.

8 Q Written?

9 A No, verbal. I don't know written. That would be  
10 something you'd have to get.

11 Q How many times do you remember that being discussed  
12 in a loan meeting?

13 A It wasn't discussed a lot. She was -- just had  
14 uncollected funds. Sometimes it would be discussed more.

15 Q What about the communications with NBC?

16 A One time I think I remember.

17 Q Okay.

18 A As I said, the monitoring of her accounts was done  
19 by our senior management because of the dollar volume. We  
20 were not entitled to monitor those.

21 Q In the loan officer meetings, did you discuss  
22 Schubert & Associates had regular drawing of checks against  
23 uncollected funds?

24 A That would be the same matter.

25 Q Okay. Did Marsha Schubert have frequent overdrafts



training.

2 Q. What's your annual salary there?

3 A. Thirty-five thousand.

4 Q. Do you receive commissions?

5 A. Not yet.

6 Q. Will you?

7 A. Yes.

8 Q. I want to talk a little bit about your past  
9 employment history.

10 A. Uh-huh.

11 Q. Let's begin with F&M Bank.

12 A. Uh-huh.

13 Q. How did you become employed with F&M?

14 A. I was in college, and I thought, you know,  
15 I needed some experience in -- you know, in working.  
16 I mean, I farmed my whole life, and that's really all  
17 I knew. So I knew that I needed to get some  
18 experience, you know, working in an atmosphere like  
19 that, and so in December of '99, I started working  
20 there just as a teller just for experience.

21 Q. Walk me through what other positions you  
22 had. You started as a teller and then --

23 A. I started as a teller, and I was a teller  
24 for, you know, around a year, I was kind of part-time  
25 because I was finishing up school. And then after I

1 Q. How long were you in the loan division?

2 A. Of the four years, probably -- probably  
3 two-and-a-half years, I would say. I mean, this is  
4 -- I'm kind of guessing on that, but, roughly --  
5 roughly, two-and-a-half years, I would say.

6 Q. Who was your supervisor when you were in  
7 the loans?

8 A. My supervisor has pretty well just been  
9 John Tom Anderson, basically, the entire time. I  
10 mean, whenever I was a teller, Melissa Moon would  
11 have been my supervisor, but after I moved past that  
12 point, it would have been -- it would have been John  
13 Tom Anderson.

14 Q. What was your salary when you were at the  
15 bank?

16 A. It -- it varied. I think my last -- the --  
17 my last year there it was 29,000, I think, was my  
18 salary.

19 Q. Tell me about the types of loans that you  
20 were authorized to make.

21 A. I had a -- like, a \$5,000, I think, lending  
22 limit, but our -- our loans always go through the  
23 meeting with the loan officers, so any loan that --  
24 you know, above that, I just ran it by them, and --  
25 and, you know, they -- they would approve it or say,

1 finished school, they came to me, and they said,  
2 you know, we would like for you, you know, to stay.

3 And, you know, at the time, I was, you  
4 know, kind of looking around at, you know, some other  
5 possibilities, but, really, you know, I was very  
6 content and happy to stay for awhile, and -- but  
7 after I was a teller for about a year, they moved me  
8 into operations. And they really didn't move me in  
9 there, they just wanted to train me some on that to  
10 where if somebody is gone -- you know, it's a small  
11 town bank, there's not really very many employees, so  
12 they really like for you to know just a little bit  
13 about each thing, you know, just enough to help out.

14 And so I learned about operations somewhat  
15 and kind of filled in for her when she was gone on  
16 vacation. I was -- she always had to come back and  
17 correct things whenever she got back because I never  
18 knew it all that well, but good enough to get by for  
19 a couple of weeks.

20 And then after that, they moved me into the  
21 lending side, and that's kind of where I, you know,  
22 settled in. I worked in the loan department,  
23 basically, just booking loans and, you know, putting  
24 on loans, and then they made me a loan officer, and  
25 that's what I ended up.

1 you know, yes or no, and that's -- that was about  
2 it --

3 Q. Who was -- who was --

4 A. -- as far as --

5 Q. -- who was they?

6 A. The loan committee, John Tom Anderson and  
7 John V. Anderson, Ed Stanton and Chad Johnson, we  
8 were all in the meetings together.

9 Q. The gentlemen that you just named, were  
10 they the only four that worked with you the entire  
11 time that you were there in the loan division; is  
12 there anyone else?

13 A. From on the Crescent bank, yes. There was  
14 -- you know, the -- there's a Guthrie branch,  
15 as well, which Barry Anderson, Charles Moad, they  
16 work over there, but I really never worked with them  
17 so to speak.

18 Q. Chad Johnson, was he over you in any way?

19 A. He had been there longer, but we were kind  
20 of -- I would say kind of along the same lines. I  
21 mean, he had more authority, he had been there a lot  
22 longer.

23 Q. He could make a loan with a higher amount?

24 A. I think so. I think so, yeah.

25 Q. What about Ed Stanton?

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Q. Did he tell her about those?  
A. I wasn't in the meetings.  
Q. Did he ever tell you about those conversations?  
A. No.  
Q. Do you have an accountant, Chad -- or I'm sorry, Justin, do you have an accountant?  
A. Yes.  
Q. And who is that?  
A. Doug Dittmyer in H&R Block in Stillwater.  
Q. Did you claim the income that you earned from your options account on your taxes?  
A. No, I have not.  
Q. And can you explain to me why?  
A. I asked Marsha about the -- I said, you know, "Do I need to file this -- anything that I pull out on my -- on my taxes?" And she said, no, that she -- she takes care of it. She said that that money has already been paid -- the taxes have already been paid on that.  
Q. Did you ask your accountant about this?  
A. I -- I ran it by him at one time.  
You know, I said, "Have you ever, you know, heard of options?" You know, I didn't know anything. I mean, I still don't know tax law, by any means, but I ran

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1 it by him. I said, you know, "Do you know anything  
2 about this?" He said, "No, I really don't." And  
3 that was -- that was about it. Didn't -- didn't go  
4 into detail.  
5 Q. You didn't tell him you were making -- she  
6 was writing you checks and --  
7 A. No.  
8 Q. Did Mrs. Schubert discuss her acts of  
9 business in depth with you? Did she explain how the  
10 business ran?  
11 A. She didn't -- she didn't really explain  
12 anything in depth to me. I -- I -- I had very short  
13 conversations with her. I mean, the longest  
14 conversation that I probably had was whenever I went  
15 and talked to her about going to work for her. I  
16 never had any detailed information on -- on anything  
17 -- anything else.  
18 Q. But when you went and talked to her about  
19 work --  
20 A. Uh-huh.  
21 Q. -- working for her --  
22 A. Yes.  
23 Q. -- did she tell you how the business was  
24 run?  
25 A. No, no, she didn't. Basically, I went and

Page 68

1 talked to her, and she said she'd guarantee me,  
2 you know, 4,000 a month, and she said, "I'll get you  
3 in contact with -- with AXA, you know, John Coburn."  
4 And she made a couple of calls, called me back, and  
5 said, okay, go meet with him at this time and day and  
6 that was about it that I remember.  
7 Q. So what time period did you become employed  
8 with AXA?  
9 A. It would have been -- my last day at the  
10 bank was February 15th --  
11 Q. Of 2000 --  
12 A. -- of 2004, so it would have been  
13 thereafter, a month after that, sometime in March,  
14 something like that I would -- I would guess.  
15 Q. And who hired you?  
16 A. John Coburn was the -- was the guy that I  
17 interviewed with, and he's the one that said,  
18 you know, that he -- he would take me.  
19 Q. What was your position going to be?  
20 A. Well, I was going to be a financial advisor  
21 after I did all my training, which was -- I didn't  
22 realize it was that long of a process.  
23 Q. Tell me your educational background that  
24 would have helped you be ready for this type of  
25 position; where did you go to college?

Page 69

1 A. I went to college at Oklahoma State  
2 University.  
3 Q. And your major?  
4 A. I majored in agricultural economics,  
5 marketing and business. As far as my educational  
6 background that would help in this business, it was  
7 very limited. I had just basic accounting, you know,  
8 I had a very, very basic finance class that touched  
9 in the bonds, just very, very basic.  
10 Most of my finance class was to do with  
11 amortization schedules and time value of money, and  
12 that's really all the education that I had in this  
13 line of work, for sure. I mean, I didn't know much  
14 about it. I was interested in it. You know, it  
15 intrigued me, but I didn't know very much about it at  
16 all.  
17 Q. Do you think Mr. Coburn hired you based on  
18 Mrs. Schubert's recommendation?  
19 A. Possibly.  
20 MR. BRYANT: Object to the form. Go  
21 ahead and answer.  
22 THE WITNESS: Possibly.  
23 Q. (By Ms. Cornmesser) Did you receive  
24 commissions at all while you were at AXA?  
25 A. No.



1 IN THE DISTRICT COURT OF LOGAN COUNTY  
2 STATE OF OKLAHOMA

3 OKLAHOMA DEPARTMENT OF )  
4 SECURITIES, ex rel. IRVING L. )  
5 FAUGHT, Administrator, )  
6 Plaintiff, )  
7 vs. ) CASE NO. CJ-2004-256  
8 MARSHA SCHUBERT, an individual )  
9 and d/b/a SCHUBERT & ASSOCIATES; )  
10 and SCHUBERT & ASSOCIATES, an )  
11 unincorporated association, )  
12 Defendant. )

13 \*\*\*\*\*

14 DEPOSITION OF JORDAN CARRIS  
15 taken on behalf of the  
16 Plaintiff  
17 on April 4, 2005  
18 in Enid, Oklahoma

19 \*\*\*\*\*

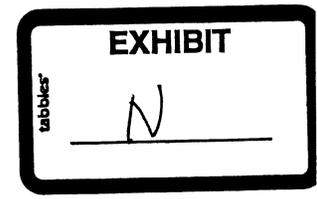
20 WORD FOR WORD REPORTING, L.L.C.  
21 2220 FIRST NATIONAL CENTER  
22 120 NORTH ROBINSON AVENUE  
23 OKLAHOMA CITY, OKLAHOMA 73102

24 Reported by: MARTI M. MARTIN, C.S.R.  
25

1 those funds were actually being sold?  
2 A No, I did not.  
3 Q Did you ever hear Chad talk about his investments  
4 around the bank to others?  
5 A No, I did not.  
6 Q Does the bank have disclosure requirements for  
7 outside business income?  
8 A I believe that we do in our -- oh, gosh. I believe  
9 it's the Code of Ethics. It's just we can't -- but, I  
10 don't -- it's not -- I think that's more of gifts. I don't  
11 believe there's anything saying we can't buy and trade stock  
12 or anything like that.  
13 Q Do you usually need to verify that with a statement?  
14 MR. TIPPENS: Object to the form. Who would  
15 verify?  
16 MS. CORNMESSER: Internal controls officer.  
17 MR. TIPPENS: Would ask --  
18 MS. CORNMESSER: For statements.  
19 MR. TIPPENS: From the question, you're  
20 saying is he required to ask all of the employees  
21 of the bank to look at their own personal  
22 statements? Is that the question?  
23 MS. CORNMESSER: I think because this was  
24 outside of her business and it was Schubert &  
25 Associates and not coming from a legitimate --

1 Q Okay.  
2 A I didn't verify that.  
3 Q Does the bank have any disclosure requirements for  
4 receiving money from a bank customer?  
5 A Say that again, please.  
6 Q Does the bank have any disclosure requirements for  
7 receiving money from a bank customer?  
8 A Not that I'm aware of. I'm not really sure of what  
9 you're asking. I apologize. Could you rephrase it or give an  
10 example?  
11 Q Marsha Schubert being a bank customer paying anyone  
12 moneys. I mean, was there a disclosure requirement for  
13 receiving moneys from a bank customer?  
14 A No.  
15 Q Okay. Did you ever attend any staff meetings?  
16 A Yes, I did.  
17 Q What kind of staff meetings did you attend?  
18 A In the mornings I attended the loan meetings.  
19 They're loan committee meetings is what they're called.  
20 Q Did you attend those from the time you started?  
21 A I attended them from June up until, I want to say,  
22 just the end of the year because at that time -- around that  
23 time I transferred to the Guthrie office. I attended their  
24 morning meetings, but not Crescent's.  
25 Q Was Mrs. Schubert or the activity in her accounts

1 ever discussed in staff meetings?  
2 A Yes, it was.  
3 Q And what was discussed?  
4 A At one time it was discussed about the uncollected  
5 funds.  
6 Q Okay. What was the discussion?  
7 A Pretty much that -- I recall that -- I don't know  
8 who said it exactly, but the discussion what that it was  
9 getting up pretty high again and that they were going to  
10 discuss with her about getting that taken care of and getting  
11 that back down.  
12 Q Who was there at that meeting, do you remember?  
13 A It was Chad Johnson, John Tom Anderson, and  
14 John V. Anderson.  
15 Q Do you remember approximately when this was?  
16 A I do not to be honest with you. I would say it was  
17 probably -- if I gave you a month, I would just hate to be  
18 wrong. It was between -- I know it was for sure close to  
19 September or October, somewhere in there.  
20 Q Was it just one occasion where they discussed her  
21 uncollected funds or was it more than that in the staff  
22 meetings?  
23 A I would say just one or two times. It was probably  
24 the same discussion each time.  
25 Q Okay. Do you know who made the call after that was



1 A Just our general ledger. I'm sorry. I review the  
2 uncollected funds report now and I review our overdrafts.

3 Q Did you ever see the Schubert & Associates account  
4 appear on these reports?

5 A Yes.

6 Q And what would happen after that?

7 A I -- basically we -- like in the committee, we just  
8 monitored that report. I mean, that's about it. I mean, I  
9 don't know what was discussed between whoever called her. I'm  
10 just saying there was nothing really -- we didn't make a  
11 decision at that time on anything to do.

12 Q Did you discuss other customers during those  
13 meetings?

14 A Yes, we did. And in particular, we did discuss  
15 uncollected funds on other customers as well.

16 Q How often would you say that Schubert & Associates  
17 appeared on the uncollected funds report?

18 A I would say quite regularly.

19 Q What about the overdraft report?

20 A That, I do not -- I couldn't tell you. I know  
21 that -- I couldn't even tell you if they did one time to be  
22 honest.

23 Q Do you remember the first time that you noticed  
24 Schubert & Associates being on these reports? Was it after  
25 you started?

1 A Yes. What happened was we converted in June to  
2 Intercept. I'm not an IT guy, but basically it's a new  
3 program, you know, that you get reports from. We found -- we  
4 had asked for the uncollected report, you know, and finally  
5 got that around the time that I started reviewing that.  
6 That's when we started discussing it, you know. That's about  
7 the time that I noticed was when we first got the report.

8 Q When was that?

9 A It's -- I couldn't tell you the exact month, but it  
10 was after June, July. It was probably around August.

11 Q Of 2004?

12 A Yes.

13 Q Were you aware if there were regular drawings of  
14 checks against uncollected funds in Schubert & Associates?

15 A I believe there were.

16 Q Do you know who approved the payments on those  
17 uncollected funds?

18 A No, I do not. I honestly don't.

19 Q And you stated that you weren't aware if Marsha  
20 Schubert had frequent overdrafts; is that correct?

21 A That's correct.

22 MR. TIPPEMS: What was that question?

23 MS. CORNMESSER: If Mrs. Schubert had  
24 frequent overdrafts. He stated earlier he did not  
25 know if --

1 IN THE DISTRICT COURT OF LOGAN COUNTY  
2 STATE OF OKLAHOMA

3 OKLAHOMA DEPARTMENT OF )  
4 SECURITIES, ex rel. IRVING L. )  
5 FAUGHT, Administrator, )  
6 Plaintiff, )  
7 vs. ) CASE NO. CJ-2004-256  
8 MARSHA SCHUBERT, an individual )  
9 and d/b/a SCHUBERT & ASSOCIATES, )  
10 and SCHUBERT & ASSOCIATES, an )  
11 unincorporated association, )  
12 Defendant. )

11 \* \* \* \* \*

12 DEPOSITION OF MELISSA MOON  
13 taken on behalf of the  
14 Plaintiff  
15 on April 4, 2005  
16 in Enid, Oklahoma

17 \* \* \* \* \*

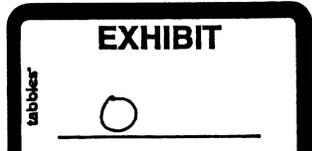
21 WORD FOR WORD REPORTING, L.L.C.  
22 2220 FIRST NATIONAL CENTER  
23 120 NORTH ROBINSON AVENUE  
24 OKLAHOMA CITY, OKLAHOMA 73102

25 Reported by: MARTI M. MARTIN, C.S.R.

1 A I chose not to go.  
2 Q Okay. How often when you did attend was Marsha  
3 Schubert's accounts discussed?  
4 A Maybe once a month.  
5 Q Okay. When you did attend the staff meetings, did  
6 any employee ever discuss their options account?  
7 A No.  
8 Q Melissa, do you know Michael Brennan?  
9 A Yes.  
10 Q How do you know Michael?  
11 A He came to the bank and did some work for us.  
12 Q What kind of work?  
13 A Like when we bought the Bank of Crescent, he came in  
14 and did an analysis and things like that. He helped us when  
15 we purchased the Bank of Crescent.  
16 Q Did you have any communications with Mr. Brennan  
17 about a Ponzi scheme?  
18 A Yes.  
19 Q Could you explain what happened?  
20 A He discussed with me that Chad was not receiving  
21 statements on his investment. He said it sounded -- it could  
22 be a Ponzi scheme. I asked him what a Ponzi scheme was.  
23 Q And then what happened?  
24 A That was all. He explained it.  
25 Q Did you discuss with Chad Johnson about your

1 A John V. Anderson, John Tom Anderson, Ed Stanton. It  
2 depends on how far you want to go back. Justin was in some of  
3 these and Chad Johnson.  
4 Q Okay. You stated earlier that the discussions would  
5 entail uncollected funds. But then when we talked a few  
6 minutes ago, the service charge report would show what the  
7 uncollected funds would be. But if no one was looking at the  
8 service charge report, how would they know to be talking about  
9 the uncollected funds?  
10 A There was accounts that John V. Anderson would look  
11 over monthly.  
12 Q Okay. Do you know what those were?  
13 A Some of them were like Crescent Foods or -- and  
14 Marsha was one of them. There was a couple more, but I really  
15 can't remember.  
16 Q Do you know why Marsha's was one of those?  
17 A I would assume because of the uncollected funds.  
18 Q You also stated earlier that her wire activity, you  
19 weren't sure if it was high based on the type of business that  
20 she did. Did you ever have any discussions with Don Spicer to  
21 help you understand the securities part of it and see if that  
22 was a normal amount of wires?  
23 A No.  
24 Q What did you think she was wiring?  
25 A Investments for her customers.

1 like he wanted to look them over.  
2 Q Were you at all involved in that process?  
3 A I printed out reports for him if he wanted to look  
4 at them, or their statements I should say, her statements or  
5 other account information that he wanted to look at.  
6 Q And other than accounts that John V. Anderson felt  
7 like should be monitored, was there any other system to  
8 monitor uncollected funds prior to June 2004?  
9 A Not that I'm aware of.  
10 Q And what about check kiting, how was that monitored  
11 prior to June of 2004?  
12 A Mainly if we -- in the fed returns if we would see  
13 repeated checks coming back insufficient that were drawn on a  
14 customer's account -- I mean, not drawn on the customer's  
15 account. It was -- the customer's name was -- I don't know  
16 how to say it. But they would be at the top of the check and  
17 also they -- it would be like they wrote it out to our bank  
18 and deposited into their account with our bank. It was the  
19 same name, but different banks.  
20 Q And in the time period of 2001 through the end of  
21 May 2004, who at the bank was involved in that monitoring  
22 process for possible check kiting?  
23 A I looked over the fed returns every day.  
24 Q Anyone besides yourself at Farmers & Merchants Bank  
25 involved in that process?



1 Q So he resigned in February and Mr. Stanton resigned  
2 in March of 2004?

3 A Yes.

4 Q And did other individuals within the bank take their  
5 place as officers and participate in these staff meetings?

6 A We did not hire somebody until November of 2004.

7 Q And who was that?

8 A Ethan Keifer. Then we hired another loan officer in  
9 2005.

10 Q And who was that, please?

11 A Todd Pray.

12 Q Can you spell his last name?

13 A P-R-A-Y.

14 Q And Ethan Keifer, was he a loan officer as well?

15 A Yes.

16 Q And it's your understanding that these officers met  
17 each morning at Farmers & Merchants Bank?

18 A Yes.

19 Q And speaking about Marsha Schubert and her  
20 uncollected funds, I believe you testified earlier that the  
21 officers approved payment on those funds regarding her  
22 accounts; is that correct?

23 A Yes.

24 Q And how did you become aware of that fact?

25 A Well, if she happened to be insufficient, they go

1 over the insufficients in the morning and they approve to pay  
2 or return those checks.

3 Q What I'm getting at, were you present in these  
4 meetings to hear the officers approve payment on uncollected  
5 funds regarding Marsha Schubert?

6 A Not every day, no.

7 Q Were you ever present to hear such a decision from  
8 the officers at Farmers & Merchants Bank?

9 A Yes.

10 Q And how many occasions did you personally overhear  
11 or witness them approve payment on uncollected funds regarding  
12 Marsha Schubert?

13 A I don't know times.

14 Q Can you give me an approximation?

15 A Not accurately.

16 Q The times that you were present when the officers  
17 approved payment on uncollected funds regarding Marsha  
18 Schubert, did you observe there to be a big debate over this  
19 issue, or was it a pretty open-and-shut decision?

20 A I don't think there was a debate.

21 Q You said it was John V. Anderson that was in charge  
22 of reviewing uncollected funds prior to F&M Bank obtaining  
23 this new system?

24 A Yes.

25 Q On the occasions you were present, did John V.

1 Anderson bring to the other officers' attention during these  
2 morning meetings that there was uncollected funds regarding  
3 Marsha Schubert's account?

4 A Yes.

5 Q And was approval of payment on those uncollected  
6 funds, to your knowledge, voted on by the officers present at  
7 the meetings?

8 A No.

9 Q How was that decision made?

10 A I guess just a discussion. They probably had  
11 someone call her and talk to her.

12 Q Were you ever asked to call Marsha Schubert  
13 regarding these uncollected funds?

14 A No.

15 Q Do you know whose responsibility that was?

16 A I know that Chad did occasionally and John V.  
17 Anderson.

18 Q When talking about uncollected funds, does that mean  
19 a check that Marsha Schubert, for example, would have  
20 deposited into her account that had not yet cleared?

21 A That's right.

22 Q Did the bank at any time from 2001 until this new  
23 computer report system was implemented in June 2004 have any  
24 policy in effect regarding payment on uncollected funds?

25 A I don't know.

1 Q Are you personally aware of any other bank customer  
2 in this same time period, 2001 to June 2004, besides Marsha  
3 Schubert that had uncollected funds on a regular basis?

4 A Yes.

5 Q How many other bank clients would fall into that  
6 category?

7 A I don't know. I would say several. I mean,  
8 personal accounts you have uncollected funds all the time.

9 Q Within this group of accounts and bank customers  
10 that did have uncollected funds, can you tell me how Marsha  
11 Schubert compared in terms of regularity of having uncollected  
12 funds?

13 A I really don't know.

14 Q For example, you said she had a lot more wire  
15 transfers than any other bank customer, correct?

16 A Uh-huh.

17 Q Can you make such a determination regarding  
18 uncollected funds on her accounts?

19 A I would say her uncollected funds amount was higher  
20 than other customers.

21 Q Were other customers of Farmers & Merchants Bank,  
22 whether personal accounts or business accounts, charged fees  
23 or service charges for payment on uncollected funds?

24 MR. TIPPENS: Are you talking about in  
25 commercial accounts like she was charged?

1 IN THE DISTRICT COURT OF LOGAN COUNTY  
2 STATE OF OKLAHOMA

3 OKLAHOMA DEPARTMENT OF )  
4 SECURITIES, ex rel. IRVING L. )  
5 FAUGHT, Administrator, )  
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7 vs. ) CASE NO. CJ-2004-256  
8 MARSHA SCHUBERT, an individual )  
9 and d/b/a SCHUBERT & ASSOCIATES; )  
10 and SCHUBERT & ASSOCIATES, an )  
11 unincorporated association, )  
12 Defendant. )

11 \* \* \* \* \*

12 DEPOSITION OF BETH ARMER  
13 taken on behalf of the  
14 Plaintiff  
15 on April 4, 2005  
16 in Enid, Oklahoma

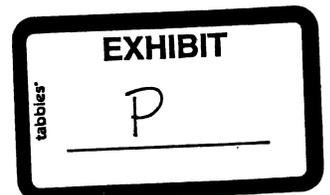
17 \* \* \* \* \*

21 WORD FOR WORD REPORTING, L.L.C.  
22 2220 FIRST NATIONAL CENTER  
23 120 NORTH ROBINSON AVENUE  
24 OKLAHOMA CITY, OKLAHOMA 73102

25 Reported by: MARTI M. MARTIN, C.S.R.

1 A I imagine.  
2 Q How many day a week do you work or hours?  
3 A Well, I work every day --  
4 Q Okay.  
5 A -- till about noon.  
6 Q Okay. Do you know what time Marsha or any of these  
7 women would make the deposits for her?  
8 A They varied.  
9 Q Okay. Have your hours been the same ever since you  
10 started working at F&M Bank?  
11 A No, they change. It's according to -- we have  
12 college girls that help out, too. When their hours change,  
13 mine change.  
14 Q All right. Is it always maybe less than 20 or about  
15 20 hours a week?  
16 A I'd say maybe 30.  
17 Q Okay. Beth, at any time did you communicate to  
18 Marsha that John V. Anderson asked to see her deposits?  
19 A No.  
20 Q You never had a conversation with her that at some  
21 point John V. Anderson had asked you?  
22 A No.  
23 Q Did John V. --  
24 A Now, he did ask all the tellers, but I never had a  
25 conversation.

1 Q Do you remember when this was?  
2 A I'm sorry, I don't.  
3 Q In the last year, last two years?  
4 A I'd go two years.  
5 Q Okay. Did he ever tell you why he wanted to see her  
6 deposits?  
7 A No.  
8 Q Was it just for one day, more than one day?  
9 A No. That was a couple of months maybe.  
10 Q So you would just set them aside?  
11 A Uh-huh.  
12 Q And he would come by and look at them or you --  
13 A Uh-huh.  
14 Q Okay.  
15 A Or I would just tell Meliassa.  
16 Q Did you do this for anybody else?  
17 A No. Do you mean have we been asked to do it for any  
18 others?  
19 Q Yes.  
20 A No, we haven't.  
21 Q Did you at any time ever hear anyone at the bank  
22 discuss making a profit off of Mrs. Schubert's activities?  
23 A Yes.  
24 Q And could you tell me about that.  
25 A They just mentioned that --





- 1 -

## FEDERAL BUREAU OF INVESTIGATION

Date of transcription 01/24/2005

JOHN V. ANDERSEN, Chairman of the Board, FARMERS AND MERCHANTS BANK, 116 South Grand, Crescent, Oklahoma 73028 was interviewed at his office at FARMERS AND MERCHANTS BANK. Also present was Special Agent GRANT BRANNUM, Internal Revenue Service, Criminal Investigative Division. ANDERSEN was advised of the identity of the interviewing Agents and the nature of the interview. ANDERSON thereafter provided the following information:

ANDERSEN advised that he was familiar with an account held by MARSHA SCHUBERT at his bank and was familiar that MARSHA has been under investigation by the Oklahoma State Department of Securities since October 2004.

ANDERSEN was asked by the interviewing Agents about large service charges placed on SCHUBERT's account during some of the time she had an account at his bank. ANDERSEN advised that SCHUBERT was running a fairly large uncollected balance each month in her account. ANDERSEN and other loan officers at his bank had conversations with SCHUBERT at that time about her negative uncollected balances and the fact that SCHUBERT needed to come in and secure those balances with some kind of collateral. ANDERSON told SCHUBERT the bank was going to view it as an unsecured loan and assess the service charge that is normally assessed on those type of accounts if she did not collateralize it. ANDERSEN advised that the standard service charge on that type of uncollected balance was Wall Street prime rate plus four percent. That rate was applied on the average uncollected balance over the month period of time. The service charge showing up on SCHUBERT's monthly statements were automatically computed on the service charge schedule built into the bank's computers.

ANDERSEN stated that SCHUBERT was aware of these service charges and had explained to ANDERSEN that she planned to cover those uncollected balances at some time in the near future. ANDERSON continued by stating that it was obvious to him that she was playing a float or a kite at his bank and he wanted to protect himself. ANDERSEN changed the status of SCHUBERT's account from a personal checking account to a business account to allow him to put those service charges on there.

Investigation on 01/10/2005 at Crescent, Oklahoma

File # 316B-OC-66188-32 Date dictated 01/11/2005

by SA KEVIN J. MARKEY gw

EXHIBIT

tabbles

318B-OC-66188

JOHN V. ANDERSEN

On 01/10/2005

Page 2

Continuation of FD-302 of

ANDERSEN was asked by the interviewing Agents if he ever invested monies with SCHUBERT. ANDERSEN advised that he did not, but was aware that two of his loan officers, CHAD JOHNSON and ED STANTON, had invested with SCHUBERT and were getting big checks every month from her. ANDERSEN recalls that the returns JOHNSON and STANTON were making may have been in the area of 20 to 30 percent returns on their investment based on ANDERSEN's discussions with JOHNSON and STANTON. ANDERSEN stated that the rates at that time in the banking industry were one to two percent returns and that it appeared "too good to be true." ANDERSEN stated that he (ANDERSEN) warned JOHNSON and STANTON to be careful because rates that high were "too good to be true." ANDERSEN stated that it was obvious JOHNSON and STANTON did not listen to him and they appeared to be "blinded by the money." When asked if SCHUBERT ever provided ANDERSEN with an explanation as to what she was doing with all that activity in her account, ANDERSEN stated that she did not give him an explanation but it was obvious to ANDERSEN that SCHUBERT was "floating money" between different banks and individuals. ANDERSEN stated that he did not want FARMERS AND MERCHANTS BANK to be on the "bad end" of this float. ANDERSEN recalls that there were two banks in Kingfisher that were involved in SCHUBERT's "float" and that there were several people who had accounts at those banks that were involved in the nearly daily deposit and transactions into and out of SCHUBERT's account at FARMERS AND MERCHANTS BANK. ANDERSEN stated that one of the banks in Kingfisher was NBC BANK. ANDERSEN stated that he did not have any conversations with those banks or individuals about the activity in SCHUBERT's account.

ANDERSEN continued by stating that SCHUBERT was a "good supporter" of the town of Crescent and a supporter of the Future Farmers of America program at the high school. SCHUBERT was also instrumental in raising money to build an agricultural barn for the high school. ANDERSEN stated that SCHUBERT came from a good family and was a business owner in Crescent. ANDERSEN recalled that SCHUBERT and her daughter ran a fireworks stand for a couple of years and donated the profits from that stand to the Chamber of Commerce and the museum in town.

ANDERSEN was asked by the interviewing Agents if he was aware of any Suspicious Activity Reports that the bank may have filed on SCHUBERT while she held the account at their bank. ANDERSEN responded that he was not aware of any Suspicious Activity Reports filed by his bank.

IN THE DISTRICT COURT OF LOGAN COUNTY

STATE OF OKLAHOMA

OKLAHOMA DEPARTMENT OF )  
SECURITIES, ex rel. IRVING L. )  
FAUGHT, Administrator, )  
Plaintiff, )  
vs. )  
MARSHA SCHUBERT, an individual )  
and d/b/a SCHUBERT & ASSOCIATES; )  
and SCHUBERT & ASSOCIATES, an )  
unincorporated association, )  
Defendant. )

CASE NO. CJ-2004-256

DEPOSITION OF DENNIS THERMER

taken on behalf of the Plaintiff

on April 1, 2005

in Oklahoma City, Oklahoma

WORD FOR WORD REPORTING, L.L.C.

2220 FIRST NATIONAL CENTER

120 NORTH ROBINSON AVENUE

OKLAHOMA CITY, OKLAHOMA 73102

Reported by: MARTI M. MARTIN, C.S.R.

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1 up with Berry, Matthews, and Wilcox on a monthly basis?

2 A Did I ever ask her that?

3 Q Yes.

4 A I don't recall.

5 Q Did you ever ask her why she just didn't wire the funds into their accounts?

6 A Yes.

7 Q What made you think that? What would be easier about wiring the funds?

8 A We wouldn't have uncollected funds.

9 Q Did you talk to anyone at Farmers & Merchants Bank about the activity?

10 A I cannot be positive on that.

11 Q What if I told you a bank employee stated you told John Tom Anderson about the activity in these accounts?

12 A I have talked to John Tom, but I can't tell you when it was in this time frame.

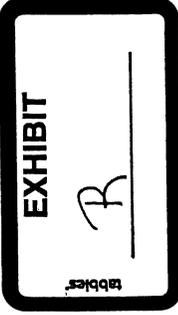
13 Q I'm not asking you when, I'm asking did you talk to anyone at the bank.

14 A Yes, I talked to John Tom Anderson about it.

15 Q Tell me the conversations.

16 A Basically, this is uncollected. I mean, it was at some point in here. What are we going to do about it? He's like, We're putting them on collected funds and so are we.

17 Q You can see on the statements that you changed





IN THE DISTRICT COURT OF LOGAN COUNTY  
STATE OF OKLAHOMA

OKLAHOMA DEPARTMENT OF )  
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 MARSHA SCHUBERT, an individual )  
 and d/b/a SCHUBERT & ASSOCIATES; )  
 and SCHUBERT & ASSOCIATES, an )  
 unincorporated association, )  
 )  
 Defendant. )

\*\*\*\*\*  
 DEPOSITION OF JIM TALKINGTON  
 taken on behalf of the  
 Plaintiff  
 on April 25, 2005  
 in Oklahoma City, Oklahoma  
 \*\*\*\*\*

WORD FOR WORD REPORTING, L.L.C.  
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Reported by: MARTI M. MARTIN, C.S.R.

COPY

how could they fix their accounts from being uncollected to a  
 smaller uncollected balance to a collected balance? How were  
 they going to get more money in those accounts.

MR. THOMPSON: Object to the form of the  
 question.

BY MS. CORNMESSER:

Q What was their source of getting more money into  
 those accounts?

A Other assets that they had.

Q And that's what Mr. Themer told you?

A That's what I recall in our discussions and with  
 their financial capacity.

Q What kind of other assets?

A Lots of other assets; liquid assets, cash,  
 securities, real estate, equipment, company ownerships.

Q And so did Dennis Themer verify that other assets  
 were being liquidated and put into these accounts?

A I don't know.

Q Did you ever talk to anyone at Farmers & Merchants  
 Bank about the activity that was going on between their bank  
 and NBC Bank?

A Yes.

Q Who did you talk to?

A John Tom Anderson.

Q And what did you discuss with John Tom?

A I asked him who Marsha Schubert was and how familiar  
 he was with her.

Q And what did he tell you?

A Well-respected family in the area, known them for  
 quite a while, banked them for quite a while, been in the  
 commodities -- I mean the securities business for a while.

Q Do you remember what time period this was?

A This would have been about the time this was all  
 brought to my attention.

Q So summer of 2003?

A Correct.

Q And did you talk to him about uncollected funds?

A Yes.

Q And what was that conversation?

A Said, you know, the circumstances for the  
 uncollected funds. He said they were balancing each day with  
 each other is what her conversation was. He said our  
 customers were depositing her checks and he was having an  
 uncollected funds position in his bank likewise.

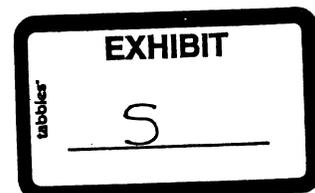
Q So you both knew you were running on uncollected  
 balances?

A I knew he was and I was at that time.

Q Was that a concern?

A No, ma'am.

Q Tell me why it wasn't a concern.





0001  
1 IN THE DISTRICT COURT OF LOGAN COUNTY  
2 STATE OF OKLAHOMA  
3  
4 OKLAHOMA DEPARTMENT OF )  
SECURITIES, ex rel. IRVING L. )  
FAUGHT, Administrator, )  
5 )  
6 Plaintiff, )  
7 )  
8 vs. ) CASE NO. CJ-2004-256  
9 )  
10 MARSHA SCHUBERT, an individual )  
and d/b/a SCHUBERT & ASSOCIATES; )  
11 and SCHUBERT & ASSOCIATES, an )  
unincorporated association, )  
12 )  
13 Defendant. )

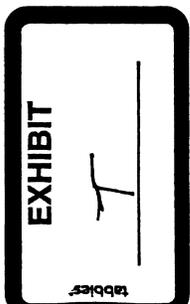
14 \*\*\*\*\*  
15 DEPOSITION OF MICHAEL BRENNAN  
16 taken on behalf of the  
17 Plaintiff  
18 on March 31, 2005  
19 in Oklahoma City, Oklahoma  
20 \*\*\*\*\*

21 WORD FOR WORD REPORTING, L.L.C.  
22 2220 FIRST NATIONAL CENTER  
120 NORTH ROBINSON AVENUE  
OKLAHOMA CITY, OKLAHOMA 73102  
23  
24 Reported by: MARTI M. MARTIN, C.S.R.  
25

0002  
1 APPEARANCES:  
2 For the Plaintiff:  
3 MS. AMANDA CORNMESSER  
and MS. GERRI STUCKEY  
4 Attorneys at Law  
State of Oklahoma Department of Securities  
5 First National Center, Suite 860  
120 North Robinson  
Oklahoma City, Oklahoma 73102  
6  
7 For the Witness:  
8 MR. TERRY W. TIPPENS  
9 Attorney at Law  
10 Fellers, Snider, Blankenship, Bailey & Tippens  
Bank One Tower  
11 100 North Broadway Avenue, Suite 1700  
Oklahoma City, Oklahoma 73102  
12  
13  
14  
15

3 named Charles Ponzi. It's down around after World War I  
4 sometime. He had a scheme going that, as I remember, involved  
5 international postal coupons that he supposedly was buying the  
6 coupons in countries with low exchange rates, redeeming them  
7 in countries with high exchange rates. He used this scheme to  
8 get investors. But he really never did buy any of these  
9 things as I understand. I've just read this somewhere. Okay.  
10 I'm giving this to you as I remember the scheme.  
11 Q Okay.  
12 A But anyway, this group got into a -- the last month  
13 or so of operation, he was taking in \$10 million from 20,000  
14 people. Anyway, it was a scheme to pay the early investors  
15 with money he was taking in from the new investors. Of  
16 course, it eventually collapsed.  
17 Q Did you conclude in October of 2002 or in 2004 that  
18 this was a Ponzi scheme?  
19 A No. Let me explain how this comes up. This is  
20 casual conversation. It had nothing to do with my assignment  
21 at the bank. I was just visiting with one of the employees  
22 who mentioned that he had invested.  
23 Q Can you tell me a time period?  
24 A This would have been in the spring.  
25 Q Of 2004?  
0021  
1 A Yes.  
2 Q Okay.  
3 A I was over there in the spring some and in the fall.  
4 Q And who were you talking to?  
5 A Chad Johnson. Is that his last name?  
6 Q I believe so.  
7 A Okay. He said he had invested \$2,000. I'm not sure  
8 about that amount, but it was somewhere in that range. He  
9 said it was worth 2,600 or 2,700 or something now. I just  
10 asked him, What's it invested in? He said, It's a pool and I  
11 own a portion percentage of that pool. I said, Well, you get  
12 a statement, don't you? No. I said, Well, how do you know  
13 what it's worth? He said, Well, I call up there and they tell  
14 me. I said, Have you ever got a statement? No. I said,  
15 Well, I would be very -- I'm a conservative person and I'd be  
16 very concerned about this type of investment.  
17 I did mention, you know, that this could be a Ponzi  
18 scheme. I said, I have no -- I don't know these people and I  
19 have no reason to think that, but this is just an opinion. I  
20 think I might have explained to him what a Ponzi scheme was.  
21 Q Did you have any conversations with anybody else at  
22 the bank about it?  
23 A Melissa asked me basically the same question.  
24 Q Melissa Moon?  
25 A Yes.  
0022  
1 Q And did she tell you she had invested?  
2 A No.  
3 Q Do you know what prompted her question?  
4 A Not other than maybe she was thinking about it. But  
5 these were -- actually, I think we were having coffee with  
6 Chad. These were just casual conversations. It had nothing  
7 to do with my assignment or what I was doing at the time.

24 Q (By Ms. Cornmesser) On October 13th of 2004 is the  
25 actual date that you prepared this analysis?  
0018  
1 A I think so.  
2 Q Just to clarify for the record, the lawsuit had not  
3 been filed yet. They had only been served a subpoena at that  
4 date.  
5 A Well, the news was out. That's all I know, I think.  
6 Q Did you look at her checking accounts during this  
7 time?  
8 A No.  
9 Q Did you ever attend any meeting where anyone  
10 discussed Mrs. Schubert's accounts during this time frame of  
11 October 2004? Were you in any meetings where Mrs. Schubert's  
12 accounts were discussed?  
13 A Not other than just to present this and go over this  
14 and explain --  
15 Q Did you --  
16 A -- answer any questions they had.  
17 Q Did they ever ask you any questions about her  
18 checking account?  
19 A No.  
20 Q Did anyone assist you in preparing the loan analysis  
21 in October of 2002?  
22 A No.  
23 Q Did anyone assist you in preparing the loan analysis  
24 in October of 2004?  
25 A Yes. Jordan, the auditor.  
0019  
1 Q Would that be Jordan Carris?  
2 A Yes.  
3 Q Okay. How did he assist you?  
4 A Basically just gathered some information for me.  
5 Basically he made printouts off the computers of information  
6 and I assembled it.  
7 Q How did you normally compile the information that  
8 you needed to prepare an analysis? Did someone gather all the  
9 documents for, or did you go and retrieve them yourself?  
10 A Usually the girls printed out the computer  
11 information about the indebtedness and so forth about loans,  
12 and then I did work from the credit file.  
13 Q The girls, were these the tellers?  
14 A The girls in the loan area, loan window, and the  
15 documentation person.  
16 Q Did Mr. Carris assist you in any other way in  
17 preparing this analysis in October of 2004?  
18 A I wrote it all out, and he did it on the computer  
19 for me.  
20 Q Okay.  
21 A Let's say he put it in good form. Basically, that's  
22 what I had written down.  
23 Q Mr. Brennan, do you know what a Ponzi scheme is?  
24 A Yes.  
25 Q How long have you known what a Ponzi scheme is?  
0020  
1 A Well, I don't know. I've used that word in the  
2 past. I think I just know from history. It relates to a man



8 Q Did Melissa tell you anything about the Schubert  
9 checking accounts at that point?  
10 A No, not necessarily that I recall.  
11 Q Did she give you any further information than what  
12 Chad had given you?  
13 A No. To my knowledge, Melissa was not an investor.  
14 I don't remember her saying anything about having an  
15 investment.  
16 Q Did you have any conversations with John V. or John  
17 Tom Anderson about it being a Ponzi scheme?  
18 A You know, I'm really not sure about that as to  
19 whether I mentioned that or not, but it would have been in a  
20 casual conversation.  
21 Q At the point that you spoke with Chad Johnson, did  
22 you feel that you needed to look at the checking accounts?  
23 A No. I really -- no. This -- I wasn't -- that  
24 wasn't my assignment. I wasn't involved in that. In fact, I  
25 don't think I did anything for the Schuberts. I'm sure I  
0023  
1 didn't at that point.  
2 Q Did you have any discussions about filing a  
3 suspicious activity report?  
4 A I did work on wires at one point and worked with  
5 a -- designing a wire transfer request form.  
6 Q Do you know when this was?  
7 A In the spring, I'm sure.  
8 Q Spring of 2004?  
9 A Yeah. Uh-huh.  
10 Q And why did the design need to change? What was the  
11 purpose of that?  
12 A Well, just to bring it up-to-date and in conformance  
13 with the regulations. I did note that Mrs. Schubert did  
14 generate wires.  
15 Q Did this cause --  
16 A Well, I thought we needed a better record of them  
17 and a more informative form, which was somewhat required, an  
18 update. They had asked me to work on a form.  
19 MS. STUCKEY: Mr. Brennan, I'm Gerri Stuckey.  
20 From -- what were you reviewing that you --  
21 MR. TIPPENS: Excuse me. Are y'all on the  
22 same --  
23 MS. CORNMESSER: Same case. I introduced her  
24 as co-counsel.  
25 MR. TIPPENS: Okay. I think that typically  
0024  
1 it's appropriate in Oklahoma that only one lawyer  
2 for a side asks the questions. It's okay if you  
3 want to take some time and write out some  
4 questions.  
5 Q (By Ms. Cornmesser) Did you have a conversation with  
6 anyone about filing a suspicious activity report?  
7 A On the Schuberts?  
8 Q Uh-huh.  
9 A No.  
10 Q For the wire activity?  
11 A No. No.  
12 Q I'm just trying to understand. So basically you



**IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA**

OKLAHOMA DEPARTMENT OF SECURITIES, )  
*ex rel.*, Irving L. Faught, Administrator, )

Plaintiffs, )

v. )

Case No.: CJ-2006-3311

FARMERS & MERCHANTS BANK, an )  
Oklahoma banking entity; JOHN V. ANDERSON, )  
Individually, and as Officer and Director of )  
Farmers & Merchants Bank; and JOHN TOM )  
ANDERSON, Individually, and as Officer )  
and Director of Farmers & Merchants Bank, )

Defendants, )

and )

ROBERT LYNN POURCHOT, Trustee of the )  
Robert Lynn Pourchot Trust; DONALD W. ORR, )  
Trustee of the Pork Chop Trust; THE WILL )  
FOUNDATION; POURCHOT INVESTMENTS, )  
LP; PHILLIP M. POURCHOT, Trustee of the )  
Phillip M. Pourchot Revocable Trust; RICHARD )  
REYNOLDS; RICHARD REYNOLDS, Trustee of )  
the Richard Reynolds Living Trust; ANNENDA )  
REYNOLDS; STEVEN B. SANDERS; VICKI L. )  
SANDERS; and CRANDALL & SANDERS, INC., )

Intervenors. )

STATE OF OKLAHOMA §

COUNTY OF OKLAHOMA §

**AFFIDAVIT OF HARRY POTTER**



I, Harry Potter, of lawful age, being first duly sworn, upon oath state as follow:

1. My name is Harry Potter. I am a Certified Public Accountant; a Certified Fraud Examiner; and a Certified Forensic Accountant. I reside in Tulsa, Oklahoma. I am over 18 years of age and competent to make this affidavit. I have personal knowledge of the information set forth herein.

2. I have an extensive background in analyzing and describing complex financial transactions and presenting the factual bases for my opinions. My qualifications to render these opinions include a degree in accounting from the University of Oklahoma in 1977 and a Masters of Business Administration degree from Heriot-Watt University in 2000; becoming certified as a CPA in 1979; having received the designation of a Certified Fraud Examiner ("CFE") in 1993; having received the designation of Certified Forensic Accountant ("CrFA") in 1997 due to my status as a Diplomat in the American College of Forensic Accountants; performing numerous audits with Touche Ross & Co. in Tulsa, Oklahoma from January 1978 to February 1986; conducting an extensive two week training seminar for auditors of the Housing Bank in Amman, Jordan; attending and speaking at various seminars; conducting training seminars for staff members of Touche Ross & Co. in Princeton, New Jersey; attending seminars on many issues, including those dealing with prudent banking practices and preparation and maintenance of proper computerized records; acting as a consultant to various financial institutions and federal agencies which regulate financial institutions; and conducting numerous investigations into the failure of various financial institutions.

3. Additionally, I have analyzed and offered testimony on the proper observance of corporate formalities and the proper exercise of fiduciary duties by directors, officers and shareholders. I have also assisted financial institutions in reviewing records after various electronic data processing conversions. I have calculated and estimated losses on billions of dollars of financial transactions involving savings and loan associations, commercial banks and other financial intermediaries. I have reviewed numerous, multi-million dollar business

transactions and have offered expert testimony in Federal, State and Bankruptcy Court proceedings in civil and criminal matters on these types of complex business transactions.

4. As a Certified Fraud Examiner, I have often investigated a wide variety of allegations of fraud, including allegations of fraudulent conveyances and other means of attempting to place assets beyond the reach of creditors. I have extensive experience in tracing of assets from various complex financial transactions through intermediary accounts to their ultimate financial use. On numerous occasions, I have analyzed complex financial transactions, such as cash and stock transfers, for the proper observance of corporate formalities and the factual basis for possible alter ego relationships and have provided expert testimony in those areas. I have reviewed millions of dollars of complex financial transactions involving financial transfers between related parties or closely-held entities and have given testimony in legal proceedings about the propriety of such transfers. I have also analyzed the solvency of debtors at or near the time of asset transfers to various family members or entities.

5. I have been retained by the Oklahoma Department of Securities (“ODS”) and the Intervenors in this matter to render various opinions regarding the conduct of Farmers & Merchants Bank (“F&M Bank”) and the individual defendants in relation to a massive fraud scheme perpetrated by Marsha Schubert (“Schubert”) against various victims, the majority of which were residents of the State of Oklahoma. In formulating my opinions, I have reviewed numerous documents including various relevant banking records of F&M Bank and depositions taken by the ODS.

6. Opinions I have formed are delineated herein. Discovery is continuing and my work in connection with this matter is also continuing. I am still in the process of reviewing evidence in this matter, and may modify these opinions, or form other opinions, or attain additional bases for my opinions.

## **I. Marsha Schubert's Scheme to Defraud**

7. While doing business as a broker for AXA, and then Wilbanks, during the period from January 2000 to mid-October 2004, Schubert was also separately doing business as Schubert and Associates. She accepted investor funds through Schubert and Associates, and had banking transactions in excess of \$267 million in her Schubert and Associates account at F&M Bank, as well as related transactions in other accounts at F&M Bank. The majority of the investor funds at issue in this matter were deposited into the Schubert and Associates bank account at F&M Bank in Crescent, Oklahoma.

8. Schubert did not make investments from her clients' funds provided to Schubert and Associates. She would create false investment statements and make verbal reports to her investors. She would provide returns and withdrawals to her clients from the pooled investment funds provided to her by her clients from Schubert and Associates. The apparent success of Schubert's investment program allowed her to attract more clients and investment dollars.

## **II. Key Components of Schubert's Scheme**

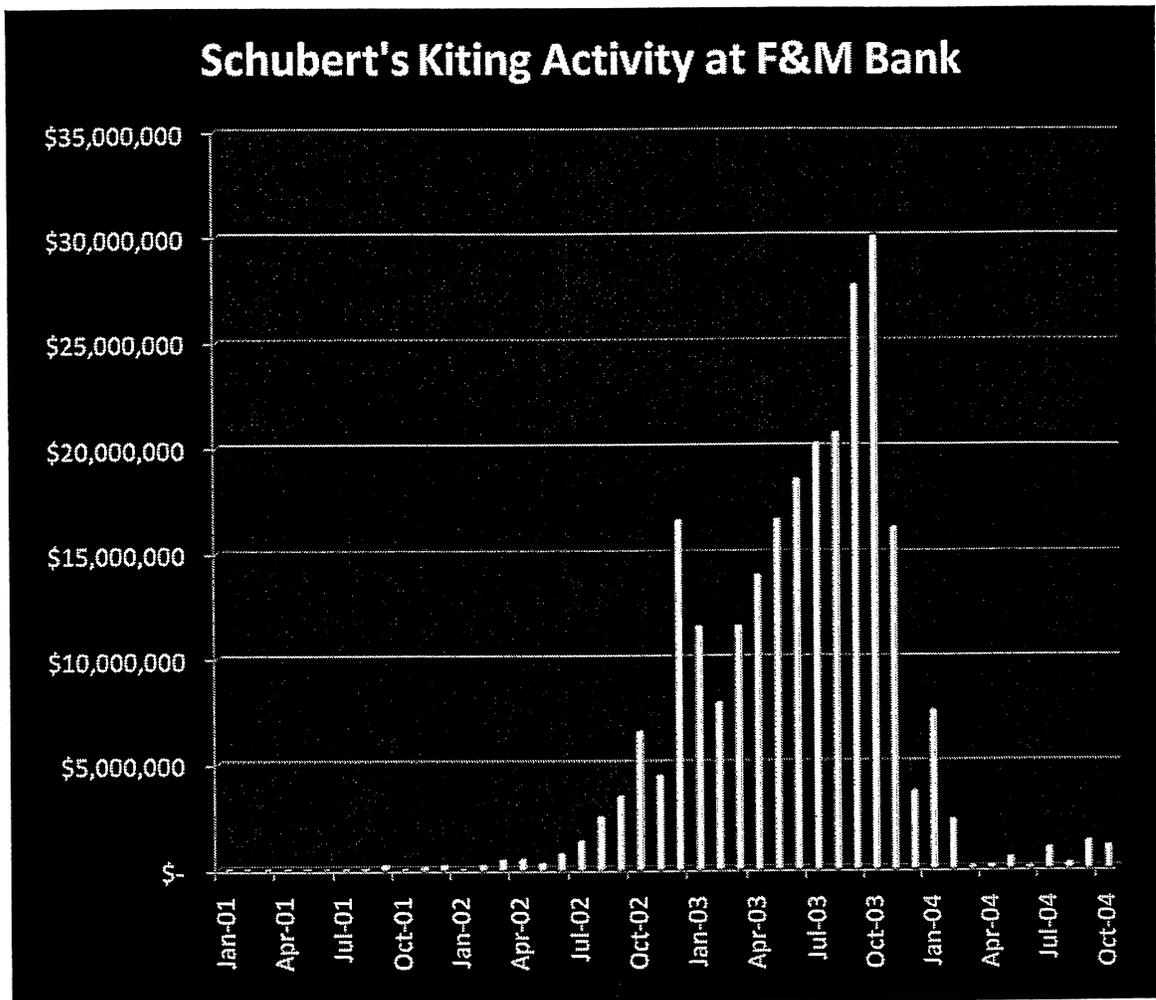
9. Schubert perpetrated a Ponzi scheme that took investors' funds and paid other investors returns without making return-generating investments. Schubert also perpetrated a check kiting scheme that created a float used to pay fake investment returns. The check kiting scheme was generally between Schubert's accounts and various individuals, including:

- a. Lance Berry,
- b. Bob Matthews,
- c. Marvin Wilcox, and
- d. Other individuals were utilized by Schubert at various times.

10. These schemes resulted in huge amounts of deposits and withdrawals being run through the Schubert and Associates account at F&M Bank. In less than a four year period, Schubert had deposits and withdrawals each exceeding \$267 million through this account. These amounts significantly exceeded the total assets of F&M Bank.

11. The check kiting scheme provided tremendous liquidity for Schubert and allowed her to generate false returns to various investors which gave her the appearance of commanding a very successful investment program.

12. Schubert's fraudulent Ponzi scheme covered the period from January 2000 to mid-October 2004. However, the following chart illustrates the magnitude of Schubert's activity through F&M Bank during the period of the kite which encompassed January 2001 to mid-October 2004, when her fraudulent activities were stopped by the ODS:



13. The following spreadsheet illustrates the pattern of the kiting activity at F&M Bank. It covers a one month period, October 2003, during the apex of the kiting activity at F&M Bank, and analyzes only the account of Marvin Wilcox. Therefore, this analysis illustrates the kiting activity allowed by F&M Bank, yet only covers a small portion of it – approximately \$10 million each of deposits and withdrawals out of a total \$500 million of deposits and withdrawals kited through F&M Bank by Schubert from January 2001 to mid-October 2004. This encompasses

only approximately 4% of the total amounts kited by Schubert through F&M Bank during the pendency of her fraudulent scheme.

Marsha Schubert				
Analysis of Kiting Activity				
Marvin Wilcox				
	Deposit		Withdrawal	Net to
Deposit	to Marsha	Withdrawal	from Marsha	Marvin
Date	(Credit)	Date	(Debit)	(Marsha)
10/1/2003	437,000	10/2/2003	434,500	(2,500)
10/2/2003	425,100	10/3/2003	426,371	1,271
10/3/2003	435,500	10/5/2003	435,707	207
10/6/2003	427,000	10/7/2003	427,282	282
10/7/2003	435,000	10/8/2003	435,901	901
10/8/2003	428,000	10/9/2003	428,408	408
10/9/2003	437,000	10/10/2003	437,506	506
10/10/2003	429,000	10/14/2003	459,000	30,000
10/14/2003	467,000	10/15/2003	467,907	907
10/16/2003	469,000	10/17/2003	470,000	1,000
10/16/2003	462,000	10/16/2003	462,700	700
10/17/2003	461,000	10/20/2003	470,000	9,000
10/20/2003	475,000	10/20/2003	472,000	(3,000)
10/21/2003	473,000	10/21/2003	503,000	30,000
10/22/2003	486,000	10/23/2003	486,400	400
10/23/2003	487,500	10/27/2003	486,000	(1,500)
10/24/2003	486,000	10/28/2003	486,402	402
10/27/2003	486,000	10/29/2003	484,000	(2,000)
10/28/2003	485,000	10/30/2003	486,000	1,000
10/29/2003	485,000	10/31/2003	509,500	24,500
10/30/2003	484,300	11/1/2003	488,000	3,700
10/31/2003	487,000	11/3/2003	487,000	-
<b>Totals</b>	<b>10,147,400</b>		<b>10,243,584</b>	<b>96,184</b>

14. This pattern of deposit and withdrawal activity should readily result in a prudent banker becoming suspicious of the activities being undertaken by Schubert, particularly one that was specifically reviewing each one of these transactions.

### III. Farmers and Merchants Bank

15. F&M Bank is an FDIC-insured, state chartered bank located in Crescent, Oklahoma. It has branch locations in Yukon, Guthrie and Piedmont, Oklahoma.

16. John V. Anderson is the Chairman, director and majority shareholder of F&M Bank. He owns 17,809 of 50,000 shares of F&M Bank or 35.6%. Jo L. Anderson, his wife, owns 15,515 shares or 31% for a total of 66.6% between her and her husband.

17. John Tom Anderson is President, Chief Executive Officer and director of F&M Bank. He owns 2,149 shares of F&M Bank, and his wife also owns 2,020 shares.

18. Between these Andersons, they own and control more than 70% of the common shares of F&M Bank.

#### **IV. Guidance to Banks on Kiting Schemes**

19. In 1996, the Office of the Comptroller of the Currency ("OCC" or "The Comptroller") issued Advisory Letter 96-6. This OCC warning notes that The Comptroller states the underlying premise of a check kite as "the customer's ability to gain access to deposited funds before they are collected from the institution on which they are drawn." This OCC Advisory 96-6 notes that suspicious circumstances which could indicate a check kite include the following:

- a. several accounts with similar names, owned or controlled by the same individuals;
- b. regular or excessive drawings against uncollected funds;
- c. frequent daily negative ending balances or overdrafts that eventually clear or are covered in a short time frame;
- d. identifiable patterns of transactions such as deposits, transfers between accounts, withdrawals, and wire transfers, often with similar or increasing amounts;
- e. deposits of large checks drawn on out-of-area banks;
- f. frequent requests by the customer for account balances, collected items, or cleared items;
- g. frequent, large deposits drawn on the same institution;
- h. deposits drawn on other institutions by the same maker or signer;
- i. large debits and credits of even dollar amounts;
- j. frequent check withdrawals to the same institution, with the maker listed as payee;
- k. a low average daily balance in relation to deposit activity;
- l. a low collected fund balance in relation to the book balance; and,
- m. a volume of activity or large debits and credits inappropriate in relation to the nature of the business of the account holder involved.

20. In an October 1994, article by Kevin B. Kendrick, Supervisory Special Agent, Federal Bureau of Investigation, entitled "Check Kiting, Float for Purposes of Profit," published in Bank Security & Fraud Prevention, Vol. 1, No. 2, 10/94, telltale account activity to look for when kiting is suspected includes:

- a. A high number of deposits - usually several per day.
- b. A high percentage of deposited funds coming from accounts under common control of the suspected kiter.
- c. Checks in float many times greater than closing bank balances.
- d. More "real" money is being taken out than put in.
- e. Deposit and withdrawal activity conceals negative actual balances.
- f. Total dollar debits and credits are almost equal.
- g. Many deposit items drawn on the same bank(s) or many checks payable to the same payee.
- h. Overdrafts covered with checks and not with cash.
- i. Checks written in "round" dollar amounts.
- j. Frequent inquiries regarding account balances.
- k. Frequent use of different bank branches.
- l. Frequent use of ATMs to make deposits.

21. Many of these warning signs were present in the activities of Schubert with F&M Bank. Between January 2000 and October 2004 when her scheme collapsed, Schubert had deposits into and withdrawals from her Schubert and Associates F&M Bank account each exceeding more than \$267 million relating to her Ponzi and kiting schemes. The largest single month of deposits into and out of the F&M Bank account was October 2003 when the total kiting activity alone, including deposits and withdrawals, aggregated approximately \$60 million. The total kiting activity that was perpetrated through F&M Bank by Schubert consisted of debits and credits each aggregating more than \$250 million, resulting in total kiting activity through F&M Bank exceeding \$500 million.

## V. F&M Bank Allowed the Scheme In Spite of Numerous Red Flags

22. During the pendency of Schubert's scheme to defraud, F&M Bank ignored numerous of the aforementioned general red flags in its dealings with Schubert, and numerous specific red flags present in her dealings with the bank, including:

1. The huge volume and dollar amount of activity being run through Schubert's accounts from 2000 to 2004, including deposits and withdrawals exceeding \$500 million.
2. At least 3,500 items exceeding the \$2,500 internal review threshold of F&M Bank cleared the bank and were directly related to Schubert's kiting scheme.
3. Identifiable patterns of almost daily deposits and disbursements developed between the Schubert and Associates F&M Bank account and the NBanC accounts of Berry, Mathews, and Wilcox. In addition to the same frequency and timing of transactions, the deposits to the Schubert and Associates F&M Bank account from the NBanC Accounts of Berry, Mathews, and Wilcox were often in identical amounts. The disbursements from the Schubert and Associates F&M Bank account made in return to Berry, Mathews, and Wilcox were in similar or increasing amounts to the amounts previously deposited to the Schubert and Associates F&M Bank account
4. There was little evidence in any of the F&M Bank transactions that Schubert was selling any identifiable individual securities, including stocks, annuities, bonds, options or any other type of investments for her Schubert and Associates clientele.
5. There were relatively few outgoing wire or other type of withdrawals from the Schubert and Associates F&M Bank account for the purchase of securities to accompany deposits of participants' monies into the Schubert and Associates F&M Bank account. During the relevant time period, less than \$2,000,000 was wired from F&M Bank to DLJ Pershing, the clearing firm for AXA, or Raymond James, the clearing firm for Wilbanks Securities, Inc., for the purchase of securities.
6. The insignificant number of outgoing wires transmitted through F&M Bank raised another red flag. The amount of money wired from the account represented less than one percent (1%) of the over \$267,000,000 deposited into the Schubert and Associates F&M Bank account during the relevant time period.
7. The more than \$267,000,000 deposited in the Schubert and Associates F&M Bank account far exceeded the total deposits of F&M Bank at its Crescent location during the same time period.
8. F&M Bank allowed the commingling of funds from Schubert's personal cattle transactions with the so-called pooled investment program funds in the Schubert & Associates account.
9. F&M Bank allowed the commingling of funds from Schubert's Kattails account with the pooled investment program funds in the Schubert & Associates account. Many "large item" investor funds were deposited into and paid out of the Kattails account.
10. F&M Bank allowed Schubert access to the Leland Schubert account over which she had no signatory authority.

11. Ed Stanton, an F&M Bank employee and its compliance officer, made no investment in the Schubert program and received more than \$104,000.
12. Justin Tarrant, an F&M Bank employee, made no investment in the Schubert program and received more than \$49,000.
13. Chad Johnson, an F&M Bank employee, made no investment in the Schubert program and received \$35,200.
14. During the height of Schubert's kiting scheme through F&M Bank, kiting proceeds averaged more than \$20 million per month.
15. Normal AXA/Wilbanks income deposits and transactions for Schubert at F&M Bank were small in relation to her pooled investment customer deposits.
16. Records prepared by Baird Kurtz and Dobson ("BKD"), accountants for Schubert's court-appointed receiver, reflect that the payments to Stanton, Tarrant and Johnson were functionally akin to a salary because they constituted periodic payments to those insiders at F&M Bank, without corresponding investments being made by these three bank employees.
17. F&M Bank would honor checks with uncollected funds and according to depositions taken by the ODS of F&M Bank employees, gave Schubert immediate funds credit and charged her for it. This was necessary to keep the kite going on with NBanC in Kingfisher that was complaining about her depositing monies there which were not backed by collected funds.
18. F&M Bank collected approximately \$88,000 on Schubert's insufficient funds charges.
19. F&M Bank also benefitted financially from the creation of float by Schubert's large deposit activity and could gain a corresponding economic return from the asset base arising from this float.
20. Schubert & Associates investors were being paid out of cash out of the F&M Bank account, rather than returns on investments, which constitutes strong indicia of the existence of a Ponzi Scheme.
21. F&M Bank is also in the business of helping to invest its own customers' funds and key officers and employees at the bank knew that Schubert was running her own personal investment business, while at the same time functioning as a broker for AXA and Wilbanks. This is a highly risky business arrangement and is susceptible to fraud, abuse and obvious conflicts of interest.
22. It was apparent from the pattern of kiting activity in the Berry, Matthews, and Wilcox accounts that Berry, Matthews, and Wilcox were being paid a fee for their participation in Schubert's float-generation scheme. This constituted further strong indicia that a fraud was occurring.
23. Numerous "investors" with Schubert received returns on their investments without having fronted any actual cash for an investment. Prominently among these were F&M Bank employees, Stanton, Johnson and Tarrant.
24. F&M Bank specifically reviewed items over \$2,500 daily. This limit would have encompassed most of the significant items running through F&M Bank that were part and parcel to Schubert's Ponzi and kiting schemes. It is apparent from these checks which constituted deposits into and withdrawals from the Schubert and Associates account at F&M Bank that, except for the signatures by Berry, Matthews, and Wilcox on those checks which were deposited into the Schubert

and Associates account at F&M Bank, all information on the deposit and withdrawal checks, including a distinctive, slanted deposit endorsement pattern, was prepared by Schubert.

## **VI. Other Opinions on Marsha Schubert's Fraudulent Scheme**

23. Schubert's fraud consisted of a Ponzi scheme fueled by a check kiting scheme.

24. Schubert's scheme included "kiting," "forgery," "overdrafts," "forced pay checks," "cross deposited items," "fictional options payments," "returned checks," "fictional cattle," "charge-backs," "loans not paid back," "delinquent accounts," "forged items," and "forged cash deposits."

25. Schubert's scheme included remuneration to key F&M Bank employees.

26. Schubert obtained the check books of various people to further her check kiting scheme.

27. F&M Bank received significant benefits from the check kiting scheme by charging large fees on uncollected funds.

28. F&M Bank benefitted by being able to obtain a return from the float that was created by the Schubert kiting scheme which ran through F&M Bank.

29. Many participants in the check kiting scheme were big "winners," including some F&M Bank employees who were responsible for oversight of Schubert's accounts, and also those that allowed Schubert to use their checkbooks to further the kiting scheme.

30. F&M Bank did not act on warning signals or regulatory guidance, such as the aforementioned OCC 96-6, which warned of indicia of check kiting.

31. John V. Anderson, Chairman of the Board of F&M Bank, gave an interview to the FBI on January 10, 2005. In the write-up of this FBI interview given, which was given to two enforcement personnel, John V. Anderson admitted that "it was obvious to him that she [Schubert] was playing a float or a kite at his bank and he wanted to protect himself."

32. There were numerous of the aforementioned "red flags" that were present in Schubert's scheme of which F&M Bank should have been aware and acted upon.

33. F&M Bank should have filed timely and appropriate Suspicious Activity Reports ("SARs") regarding the activities of Schubert.

34. F&M Bank should have stopped the kiting scheme upon its discovery.

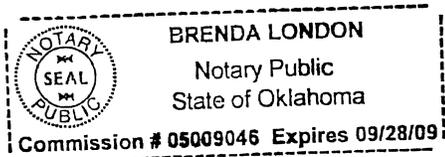
35. The continuation of Schubert's kiting scheme resulted in larger losses sustained by her "investors."

36. This actions and inactions of F&M Bank in dealing with and prolonging the fraudulent scheme perpetrated by Schubert were not typical of how a Federally-insured, financial institution should deal with such issues and lack appropriate business justification.

AFFLIANT FURTHER SAYETH NOT.

  
\_\_\_\_\_  
Harry Potter

SWORN TO AND SUBSCRIBED before me, the undersigned authority, on this the 7th day of May, 2009.



  
\_\_\_\_\_  
Notary Public in and for  
The State of Oklahoma

IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA

OKLAHOMA DEPARTMENT of SECURITIES  
ex rel. Irving L. Faught,  
Administrator,

Plaintiff,

vs.

CASE NO. CJ-2006-3311

FARMERS & MERCHANTS BANK;  
FARMERS & MERCHANTS BANCSHARES,  
INC.; JOHN V. ANDERSON; and  
JOHN TOM ANDERSON,

Defendants,

and

ROBERT LYNN POURCHOT, Trustee  
of the Robert Lynn Pourchot  
Trust, et al.,

Intervenors.

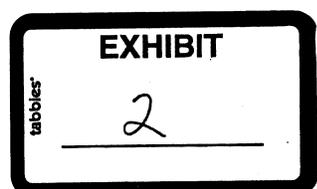
DEPOSITION OF LENARD BRISCOE  
TAKEN ON BEHALF OF THE DEFENDANTS  
ON MARCH 18, 2009, BEGINNING AT 9:15 A.M.  
IN OKLAHOMA CITY, OKLAHOMA

APPEARANCES:

On behalf of the PLAINTIFF:  
Ms. Amanda Cornmesser  
Ms. Melanie Hall  
STATE OF OKLAHOMA Department of Securities  
First National Center, Suite 860  
120 North Robinson  
Oklahoma City, Oklahoma 73102  
(405) 280-7700

(APPEARANCES CONTINUED ON PAGE 2)

REPORTED BY: Laura L. Robertson, CSR, RPR



1 if you had known she was committing securities fraud?

2 A. No.

3 Q. Would you have invested with Marsha Schubert  
4 if you had known she was violating state and/or  
5 federal laws?

6 A. No.

7 Q. Would you have invested with Marsha Schubert  
8 if you had known she never had any intent to invest  
9 your funds?

10 A. No, ma'am.

11 Q. Would you have invested with Marsha Schubert  
12 if you had known she was acting outside of the scope  
13 of AXA or Wilbanks?

14 MR. RYAN: Object to the form. Go ahead.

15 THE WITNESS: No, I wouldn't invest.

16 Q. (BY MS. CORNMESSER) Would you have invested  
17 with her -- first let me ask you this. Do you know  
18 what the term is Ponzi scheme?

19 A. I have been reading about it in the paper.  
20 And I guess that's what she was running; right?

21 Q. That's right. Would you have invested with  
22 her if you had known she was perpetuating a Ponzi  
23 scheme?

24 A. No, ma'am.

25 Q. Are you familiar with the term uncollected

1 funds?

2 A. Kind of.

3 Q. What is your knowledge of that?

4 A. Do you mean through a bank?

5 Q. Right.

6 A. You don't have the money on the other end,  
7 is what I was --

8 Q. In all of the banks that you were either a  
9 director or an owner, do you know what the policies  
10 would have been for uncollected funds?

11 A. Most of the time they collect them before  
12 they pay it out.

13 Q. Okay. As, again, keeping your position in  
14 mind, whether it be a director or an owner, would you  
15 personally have allowed a customer to operate on six  
16 figure uncollected funds for a period of three months?

17 MR. RYAN: Object to the form of the  
18 question. Insufficient facts.

19 Q. (BY MS. CORNMESSER) You can go ahead and  
20 answer.

21 A. Do I have to answer that?

22 MR. WALTERS: Yes, you do.

23 THE WITNESS: No.

24 Q. (BY MS. CORNMESSER) Would you -- tell me  
25 what you would have done then, if you would have not

1 allowed it, what would you have done?

2 A. Sent the check back.

3 Q. If you knew that a bank customer was  
4 operating a check-kite, what would you have done?

5 MR. RYAN: Object to the form. Go ahead.

6 THE WITNESS: Stopped it as soon as I could.

7 Q. (BY MS. CORNMESSER) Are you familiar with  
8 the term suspicious activity report?

9 A. I have heard about it, but I don't know.  
10 Can't describe it.

11 Q. I think you stated earlier when you were  
12 speaking with Mr. Ryan that in October of 2004,  
13 someone came to pick up your check. Do you remember  
14 who that was?

15 A. I probably wasn't there, but Ron told me  
16 somebody that worked in her office.

17 Q. You don't remember a name?

18 A. No, I don't. I don't remember mine  
19 yesterday.

20 MS. CORNMESSER: Okay, Mr. Briscoe, I don't  
21 have any further questions. Thank you for your time.

22 MR. RYAN: Just one more, Mr. Briscoe.

23 REDIRECT EXAMINATION

24 BY MR. RYAN:

25 Q. You have owned a number of small community



1           A.    I don't know when -- I don't remember --  
2 recall when they locked her up, but it was somewhere  
3 in October or November somewhere.

4           Q.    So you're telling me you didn't really know  
5 anything about right about the time the office was  
6 closed?

7           A.    No, because we sure wouldn't have put the  
8 last \$100,000 or whatever in there.

9           Q.    Right.

10           MR. RYAN:  I don't have any further  
11 questions.  These ladies down here may have some  
12 questions for you.

13                           CROSS EXAMINATION

14           BY MS. CORNMESSER:

15           Q.    Mr. Pollard, I'm Amanda Cornmesser with the  
16 Securities Department, along with Mrs. Hall.  I just  
17 have a few questions for you.

18                   Did Marsha Schubert tell you that she would  
19 invest your funds in a legitimate venture?

20           A.    Yes.

21           Q.    If you had known that Marsha Schubert was  
22 committing securities fraud, would you have invested  
23 with her?

24           A.    No way.

25           Q.    If you had known Marsha Schubert was

1 violating state and/or federal laws would you have  
2 invested with her?

3 A. No.

4 Q. Have you ever heard of the term Ponzie  
5 scheme?

6 A. Yes.

7 Q. What is your understanding of a Ponzie  
8 scheme?

9 A. Well, the first ones in get a little money  
10 back, and the last ones in lose it all.

11 Q. If you had known Marsha was operating a  
12 Ponzie scheme, would you have invested with her?

13 A. Not at all.

14 Q. If you had known that the monies that other  
15 folks were getting from Marsha Schubert were  
16 fictitious, would you have invested with her?

17 A. No.

18 Q. If you had known that the monies Marsha gave  
19 to the investors were on uncollected funds, would you  
20 have invested with her?

21 MR. RYAN: Object to the form of the  
22 question.

23 THE WITNESS: No.

24 Q. (BY MS. CORNMESSER) If you had known that  
25 the investment returns given to the investors were on



1 IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
2 STATE OF OKLAHOMA

3 OKLAHOMA DEPARTMENT of SECURITIES  
4 ex rel. Irving L. Faught,  
5 Administrator,

6 Plaintiff,

7 vs.

CASE NO. CJ-2006-3311

8 FARMERS & MERCHANTS BANK;  
9 FARMERS & MERCHANTS BANCSHARES,  
10 INC.; JOHN V. ANDERSON; and  
11 JOHN TOM ANDERSON,

12 Defendants,

13 and

14 ROBERT LYNN POURCHOT, Trustee  
15 of the Robert Lynn Pourchot  
16 Trust, et al.,

17 Intervenors.

18 DEPOSITION OF LOREN POLLARD  
19 TAKEN ON BEHALF OF THE DEFENDANTS  
20 ON MARCH 19, 2009, BEGINNING AT 10:00 A.M.  
21 IN OKLAHOMA CITY, OKLAHOMA

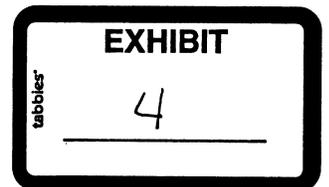
22 APPEARANCES:

23 On behalf of the PLAINTIFF:

24 Ms. Amanda Cornmesser  
25 Ms. Melanie Hall  
STATE OF OKLAHOMA Department of Securities  
First National Center, Suite 860  
120 North Robinson  
Oklahoma City, Oklahoma 73102  
(405) 280-7700

(APPEARANCES CONTINUED ON PAGE 2)

REPORTED BY: Laura L. Robertson, CSR, RPR



1           A.    I suppose so.  I mean, you know, we did a  
2 lot of banking, and I think it goes right in right  
3 then, I mean, to your account.

4           Q.    Okay.

5           MR. RYAN:  That's all I have.

6                                CROSS EXAMINATION

7 BY MS. CORNMESSER:

8           Q.    Mr. Pollard, what did Marsha tell you about  
9 what investment she was going to make for you?

10          A.    It was mostly she just said she was trading  
11 options.

12          Q.    Okay.  Did she tell you it would be a  
13 legitimate venture?

14          A.    Well, I don't know if I ever asked her if it  
15 was a legitimate venture, but she just said she was  
16 trading options and doing real well at it and was  
17 making money.  And I assumed that was what was  
18 happening.

19          Q.    If you had known that she was committing  
20 securities fraud, would you have invested with her?

21          A.    Oh, man, no.

22          Q.    If you had known that she was violating  
23 state and federal securities laws would you have  
24 invested with her?

25          A.    Uh-uh.

1 Q. Do you know what the term Ponzi scheme  
2 means? Ponzi scheme?

3 A. Yes.

4 Q. What is your understanding of that?

5 A. Well, they just take the investors' money  
6 and give it to the earlier ones, and there is never  
7 any trading really taking place. They just keep  
8 paying the earlier investors, and then they get more  
9 investors to keep it going.

10 Q. Would you have given her money if you had  
11 known she was operating a Ponzi scheme?

12 A. Uh-uh, I wouldn't have even went close.

13 Q. Mr. Pollard, did you ever serve on a bank  
14 board?

15 A. Yes.

16 Q. What bank was that?

17 A. At the time it was Kingfisher Bank & Trust.

18 Q. How many years did you serve on the board?

19 A. I don't know, 15, maybe. I really don't  
20 know.

21 Q. Do you remember approximately the years that  
22 you were there?

23 A. Yes. About the time they sold the bank to  
24 the First Capital, or First State Bank, or BancFirst.  
25 Five, six, seven, maybe ten years ago, I don't know.



1                   IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
2   STATE OF OKLAHOMA

3           OKLAHOMA DEPARTMENT of SECURITIES  
4           ex rel. IRVING L. FAUGHT,  
5           Administrator,

6                                   Plaintiff,

7           vs.

CASE NO. CJ-2006-3311

8           FARMERS & MERCHANTS BANK;  
9           FARMERS & MERCHANTS BANCSHARES,  
10          INC.; JOHN V. ANDERSON; and  
11          JOHN TOM ANDERSON,

12                                   Defendants,

13          and

14          ROBERT LYNN POURCHOT, Trustee  
15          of the Robert Lynn Pourchot  
16          Trust, et al.,

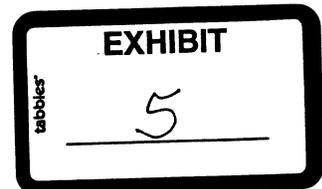
17                                   Intervenors.

18                                   DEPOSITION OF ROBERT MATHEWS  
19                                   TAKEN ON BEHALF OF THE DEFENDANTS  
20                                   ON MARCH 17, 2009, BEGINNING AT 9:15 A.M.  
21                                   IN OKLAHOMA CITY, OKLAHOMA

22                                   APPEARANCES:

23          On behalf of the PLAINTIFF:  
24          Ms. Amanda Cornmesser  
25          Ms. Melanie Hall  
          STATE OF OKLAHOMA Department of Securities  
          First National Center, Suite 860  
          120 North Robinson  
          Oklahoma City, Oklahoma 73102  
          (405) 280-7700

          (APPEARANCES CONTINUED ON PAGE 2)  
          REPORTED BY: Laura L. Robertson, CSR, RPR



1 Q. Did Marsha Schubert ever tell you she was  
2 acting outside the scope of AXA?

3 A. No.

4 Q. Did Marsha Schubert ever tell you that the  
5 payments given by her to your parents' trust were  
6 anything but a return on the investments?

7 A. No.

8 Q. Did Marsha Schubert ever tell you the  
9 primary source of payments was other investors' money?

10 A. No.

11 Q. Did Marsha Schubert ever tell you that the  
12 checks and wires into the trusts were on uncollected  
13 funds?

14 A. No.

15 Q. On insufficient funds?

16 A. No.

17 Q. If you had known that Marsha Schubert would  
18 not invest the funds legitimately for the trust, would  
19 you have allowed her to have the money?

20 A. No.

21 Q. If you had known that Marsha Schubert was  
22 committing securities fraud, would you have allowed  
23 her to have the money for the trust?

24 A. No.

25 Q. Do you hold Marsha Schubert ultimately

**IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA**

OKLAHOMA DEPARTMENT OF SECURITIES )  
*ex rel.* Irving L. Faught, Administrator, )

Plaintiff, )

vs. )

Case No. CJ-2006-3311

FARMERS & MERCHANTS BANK, et al. )

Defendants, )

and )

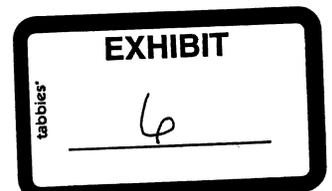
ROBERT LYNN POURCHOT, Trustee of the )  
Robert Lynn Pourchot Trust, et al., )

Intervenors. )

**AFFIDAVIT OF DAN CLARKE**

Dan Clarke, being of lawful age and being duly sworn, deposes and states as follows:

1. I am Supervisory Investigator for the Oklahoma Department of Securities (Department). I maintain the designation of Certified Fraud Examiner from the Association of Certified Fraud Examiners, a global association dedicated to providing anti-fraud education and training.
2. As part of my assigned duties as Supervisory Investigator, I supervise and conduct or assist in investigations conducted by the Department's Enforcement Division by, *inter alia*, reviewing and analyzing pertinent bank account records to determine the sources and uses of funds flowing through such bank accounts.
3. At all times material hereto, Marsha Schubert (Schubert) owned, maintained and/or controlled several bank accounts including account number 34-7477 at Farmers and Merchants Bank (F&M Bank) in Crescent, Oklahoma (Schubert F&M Account), account number 35-9424 at F&M Bank (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 (Schubert BancFirst Account).

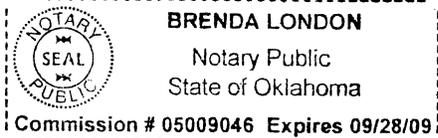
4. In connection with the above-styled action, I have reviewed and analyzed the deposit items to and disbursements from the Schubert F&M Account, the Kattails Account, the Farm Account, and the Schubert BancFirst Account, for the period beginning in December of 1999 and ending in October of 2004.
5. Marsha Schubert was unjustly enriched in the amount of \$9,034,960.07.

FURTHER AFFIANT SAITH NOT.

  
Dan Clarke

Subscribed and sworn to before me this 14<sup>th</sup> day of May, 2009.

  
Notary Public



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IN THE DISTRICT COURT OF LOGAN COUNTY

STATE OF OKLAHOMA

OKLAHOMA DEPARTMENT OF )  
SECURITIES, ex rel. IRVING L. )  
FAUGHT, Administrator, )  
 )  
Plaintiff, )  
vs. )  
 )  
MARSHA SCHUBERT, an individual )  
and d/b/a SCHUBERT & ASSOCIATES; )  
and SCHUBERT & ASSOCIATES, an )  
unincorporated association, )  
 )  
Defendant. )

CASE NO. CJ-2004-256

\* \* \* \* \*

VIDEOTAPED DEPOSITION OF ED STANTON

taken on behalf of the

Plaintiff

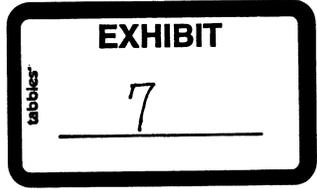
on April 6, 2005

in Oklahoma City, Oklahoma

\* \* \* \* \*

WORD FOR WORD REPORTING, L.L.C.  
2220 FIRST NATIONAL CENTER  
120 NORTH ROBINSON AVENUE  
OKLAHOMA CITY, OKLAHOMA 73102

Reported by: MARTI M. MARTIN, C.S.R.



1 investments?

2 A Of course, had to.

3 Q Did anyone else have any discussions with Don Spicer  
4 at the bank about their options accounts?

5 A I wouldn't know. It would have just been Justin or  
6 Chad to my knowledge.

7 Q Do you know Willie Huerta?

8 A Yes.

9 MR. TIPPENS: What was the last name?

10 MS. CORNMESSER: Huerta. It's H-U-E-R-T-A.

11 Q (By Ms. Cornmesser) Mr. Huerta has informed the  
12 Department that you recommended that he invest with Marsha  
13 Schubert.

14 A We had the same conversation that I told you about.  
15 He asked me if I had invested with her. I said yes. And how  
16 was doing? I said, She does good for me.

17 Q That was the extent of the conversation?

18 A Pretty much.

19 Q When you say pretty much, was there anything?

20 A Huh-uh. I had nothing bad to say about Marsha  
21 because of her performance with me, so --

22 Q But did you recommend that they go see her in any  
23 way?

24 A That was up to them. If there was any  
25 recommendation, it was -- wasn't -- didn't have anything to do

1 with me. It was a discussion and a set up of account with  
2 them.

3 Q How do you know Willie Huerta?

4 A I've traded guns with Willie for 11 years. Just a  
5 friend.

6 Q Do you know Kenneth Boren?

7 A Kenneth Boren?

8 Q Kenneth Boren.

9 A Brent Boren?

10 Q Maybe.

11 A Yes.

12 Q And how do you know Mr. Boren?

13 A He's a friend of mine from church that lives where  
14 my in-laws came from in Colorado.

15 Q Mr. Boren has also informed the Department that you  
16 recommended he invest with Marsha Schubert.

17 A The recommendations were just based off of the  
18 performance she had for me on anybody.

19 Q Did you have conversations with him inside the bank  
20 or outside the bank about --

21 A Outside.

22 Q Do you know Steve Ford?

23 A Yes, my brother-in-law.

24 Q Steve Ford has informed the Department that you  
25 recommended he invest with Marsha Schubert.

1 A Same thing.

2 Q Just a basic, generic conversation?

3 A Just a basic my experience with her. And what they  
4 discussed beyond that, I don't know.

5 Q Do you know Connie Hart?

6 A Yes.

7 Q How do know Connie?

8 A She was our secretary at the bank for years and  
9 years.

10 Q Did you ever suggest to Connie Hart that she not  
11 renew her CD with F&M Bank and instead invest her money with  
12 Schubert & Associates?

13 A She said that she was thinking about what to do with  
14 it and asked me if I invested with Marsha Schubert, and I told  
15 her that I did and that she did a good job for me. And what  
16 she did beyond that, I don't know. I don't control people's  
17 deposits.

18 Q I'll show you what's been marked as Exhibit 14.  
19 This is a phone message from January 27, 2004 from you to  
20 Marsha.

21 A Uh-huh.

22 Q The message is, Asked who check made out to for  
23 Aaron Hart's rollover, Pershing. Can you tell me what this  
24 means?

25 A Aaron and Connie had asked me to contact Marsha for

1       them and ask them.

2           Q       Why would you do that?

3           A       As a service to them.

4           Q       But you have an investment advisor sitting inside  
5       the bank that you're contracted with that you're --

6           A       I don't think he was there then.

7           Q       So if he wasn't there, then you didn't have to refer  
8       business to him?

9           A       I don't know. I mean, I don't know that he was  
10       employed then. I'm not sure.

11          Q       January 27th of 2004?

12          A       I don't know when he came on. What people did with  
13       their money was up to them.

14          Q       But you never recommended to Connie and Aaron Hart  
15       that they should take their CD that they cashed at F&M Bank?

16          A       That was completely up to them what they did with  
17       their money.

18          Q       I understand it was completely up to them. I'm  
19       asking if you recommended that to them.

20          A       Recommend that they move their CD?

21          Q       Did you recommend that they invest with Schubert &  
22       Associates?

23          A       I recommended that would be an avenue for them.

24          Q       So you did recommend that it would be an avenue for  
25       them?

1           A     An avenue only.

2           Q     So explain to me what that avenue would be.

3           A     Just to talk to her about options that they might  
4 pursue to get a better return. That's what they were asking  
5 me about specifically was a better return.

6           Q     Do you know Rosalie Lovell?

7           A     Uh-huh.

8           Q     And how do you know Rosalie?

9           A     She's a former bank employee.

10          Q     Did you suggest to Rosalie Lovell that she not renew  
11 her CD and instead take the funds and invest them with Marsha  
12 Schubert?

13          A     It would be the same conversation. People inquired  
14 with me what the rates were within the bank and then asked me  
15 if I invested with Marsha, which I said yes. Did she do good?  
16 Yes. Do you think she'd talk to us? Talk to her.

17          Q     Do you know Martha Gregory?

18          A     Uh-huh.

19          Q     And how do you know Martha?

20          A     She used to work at the bank.

21          Q     Did you suggest to Martha Gregory to take her funds  
22 from her CD that she cashed and invest in Schubert &  
23 Associates?

24          A     Only as an avenue. Only as an avenue. They  
25 inquired about my investments.

1           Q     That's a lot of people inquiring about where you  
2 invest and then ended up at Schubert & Associates. That was  
3 the system every time, they would just inquire with you where  
4 you invest and then you --

5           A     I didn't know if they ever invested with her.

6           Q     Do you know if they ever reuped their CD?

7           MS. MUEGGENBORG: Objection, speculative.

8           MS. CORNMESSER: He was advising them at the  
9 time.

10          Q     (By Ms. Cornmesser) So did they renew their CD while  
11 they were there?

12          A     Different people could renew CDs in the bank.

13          Q     So they -- none of these people renewed their CD  
14 with you that you can remember?

15          A     They had in the past. In the past.

16          Q     But at the times that you were referring Marsha  
17 Schubert, did they at any time review their CDs with you?

18          A     No, not that I know of. Not that I know of.

19          Q     Do you know Olen Rising?

20          A     Uh-huh.

21          Q     Did you ever suggest to Olen Rising that he not  
22 renew his CD with Farmers & Merchants Bank and instead invest  
23 his money with Schubert & Associates?

24          A     Same story.

25          Q     Ed, who is Eva Percy?



1 IN THE DISTRICT COURT OF LOGAN COUNTY

2 STATE OF OKLAHOMA

3 OKLAHOMA DEPARTMENT OF )  
4 SECURITIES, ex rel. IRVING L. )  
FAUGHT, Administrator, )  
5 )  
Plaintiff, )  
6 vs. )  
) CASE NO. CJ-2004-256  
7 MARSHA SCHUBERT, an individual )  
and d/b/a SCHUBERT & ASSOCIATES; )  
8 and SCHUBERT & ASSOCIATES, an )  
unincorporated association, )  
9 )  
Defendant. )

10

11 \* \* \* \* \*

12 DEPOSITION OF CHAD JOHNSON

13 taken on behalf of the

14 Plaintiff

15 on April 7, 2005

16 in Enid, Oklahoma

17 \* \* \* \* \*

18

19

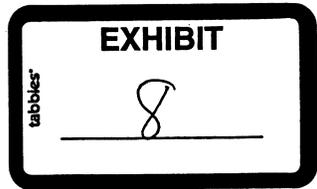
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21 WORD FOR WORD REPORTING, L.L.C.  
22 2220 FIRST NATIONAL CENTER  
120 NORTH ROBINSON AVENUE  
23 OKLAHOMA CITY, OKLAHOMA 73102

24

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Reported by: MARTI M. MARTIN, C.S.R.



1 A That's a grandmother-in-law. Is that a title?

2 Q Did she invest with Schubert & Associates?

3 A I think so, but I cannot be for sure.

4 Q Did she get any money back?

5 A I don't know. If she did, I don't know the amounts.

6 Q She got \$17,000 back just to let you know.

7 Did they all live in the Crescent area; your dad,

8 Linda Stewart, Billie Vincent?

9 A My mother-in-law, Linda Stewart, she lives in  
10 Guthrie. My dad lives in Oklahoma City. Billie Vincent lives  
11 in Sayre.

12 Q How did your dad know Marsha Schubert?

13 A Kind of the same way. They're all from Crescent.

14 Q Okay. So he knew her before?

15 A Uh-huh.

16 Q So who in the bank came in to talk to you about  
17 where your investments were and how you were doing with your  
18 options account that you just told them there was one avenue?

19 A Yeah. I believe it may have been Aaron and Connie  
20 Hart. Connie used to be the secretary at the bank. They  
21 asked me about her.

22 Q Okay. And what did you tell them?

23 A Basically the same thing; you know, it's a high risk  
24 deal, don't do it unless you've got money to lose.

25 Q Anybody else at the bank?