

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

JAN 23 2009

OKLAHOMA DEPARTMENT OF SECURITIES)
ex rel. Irving L. Faught, Administrator,)
Plaintiff,)
vs.)
FARMERS & MERCHANTS BANK, et al.)
Defendants,)
and)
ROBERT LYNN POURCHOT, Trustee of the)
Robert Lynn Pourchot Trust, et al.,)
Intervenors.)

PATRICIA PRESLEY, COURT CLERK
by _____
DEPUTY

Case No. CJ-2006-3311

**DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE
TO DEFENDANTS' MOTION TO RECONSIDER THE DENIAL
OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

COME NOW Defendants, Farmers & Merchants Bank, Farmers & Merchants Bancshares, Inc., John V. Anderson, and John Tom Anderson (collectively, "Defendants"), and respectfully file their Reply to Plaintiff's Response to Defendants' Motion to Reconsider the Denial of Defendants' Motion for Partial Summary Judgment. In support of their Reply, Defendants would show the Court as follows:

I.

While Plaintiff has now reversed its legal position on the issue of joint and several liability, Defendants' position has remained consistent. Defendants' motion for partial summary judgment clearly laid out what must be proven by Plaintiff in order for restitution to be a proper equitable remedy against Defendants. Restitution is only available as an equitable remedy "whenever one has received a benefit to which another is justly entitled. A

person who has been unjustly enriched at the expense of another is required to make *restitution to the other.*” *Stites v. Duit Construction Company, Inc.*, 1995 OK 69, 903 P.2d 293, 301 n.28 (emphasis in original). Unjust enrichment only occurs whenever one party adds to the property of another or saves the other from expense or loss for which the other has not responded with a quid pro quo. *McBride v. Bridges*, 1950 OK 25, ¶ 8, 215 P.2d 830 (citation omitted). By depriving the defendant of the benefit he gained at the expense of the plaintiff, restitution puts the parties in the same position they were before unjust enrichment occurred.

The undisputed facts of the case demonstrated that the only parties upon whom the short investors conferred benefits (i.e., “Investor Assets”) were the Relief Defendants and Marsha Schubert, not the Defendants in this case.¹ If the basis behind restitution is the inequity of retaining a benefit that belongs to another person, it is entirely inequitable to order a defendant to return Investor Assets that were, in fact, indisputably held, retained, and/or used up by others.² Accordingly, since the elements and conditions of the equitable remedy of restitution were lacking, Defendants were entitled to summary judgment on that discrete issue.

After confessing these facts, Plaintiff’s previously adopted position argued that Defendants were not entitled to judgment as a matter of law because, under the “plain language of Section 408 of the Predecessor Act and Section 1-509 of the Successor Act” Defendants could be held jointly and severally liable with Marsha Schubert. *See Response*, p. 10. Plaintiff even quoted from the express language of these statutes, noting that 408(b),

¹ The financial analysis prepared by BKD demonstrated that, of the \$9,061,293.00 in Investor Assets that were lost in Schubert’s alleged Ponzi scheme, the Relief Defendants had \$6,059,024.00 of Investor Assets and Marsha Schubert had the other \$2,817,292.00 of Investor Assets.

² *See Lapkin, M.D. v. Garland Bloodworth, Inc.*, 2001 OK CIV APP 29, ¶ 10, 23 P.3d 958.

creates joint and several liability for any **“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 . . .”** (emphasis added) (a copy of § 408 and its successor § 1-509 are attached to the Court’s copy of this reply). Plaintiff then quoted from paragraphs (1) and (2) of § 408(a).³ The Court accepted this argument and even limited the scope of permissible discovery based upon the express language of 408(a), which is far different from relevant discovery under sections 101 and 1-501.

Plaintiff never discussed Schubert’s violations of 71 O.S. § 101 of the Predecessor Act or § 1-501 of the Successor Act as a legal basis for imposing joint and several liability against Defendants. However, contrary to their prior legal position, Plaintiff’s response brief now concedes – once and for all – that it is **not** seeking joint and several liability against Defendants based upon their alleged material participation or aid in Marsha Schubert’s violations of § 408(a) of the Predecessor Act or § 1-509(B) of the Successor Act. Plaintiff plainly states that it **“brings this action against Defendants pursuant to Section 408 of the Predecessor Act and Section 1-509 of the Successor Act based on the material participation or aid to Marsha Schubert in her violations of paragraphs 2 of Sections 101 and 1-501”**. See Plaintiff’s Response to Defendants’ Motion to Reconsider, p. 8 (emphasis added).

³ In *Southwestern Oklahoma Development Authority v. Sullivan Engine Works, Inc.*, 1996 OK 9, 910 P.2d 1052, 1058, the Oklahoma Supreme Court expressly established the elements for establishing a defendant’s joint and several liability under § 408(b): “(1) that the defendant was a material participant or aided in the sale of securities by a seller, and (2) that the seller is ‘liable’ under § 408(a) [not § 101 or § 1-501].” *Id.* Similarly, *Lillard v. Stockton*, 267 F.Supp.2d 1081 (N.D. Okla. 2003) provides “[p]laintiffs must plead and prove... (1) That some person committed a primary violation of § 408(a)... and (2) That the Defendants... materially participated or aided in the sale of securities by the primary violator.” See also, *Nikkel v. Stifel, Nicolaus & Co.*, 1975 OK 158, 542 P.2d 1305, 1308-1309 (“408(b)... places liability on one who materially participates or aides in a sale made by one liable under subsection (a)). As is readily observable, joint and several liability only arises when a person materially participates or aids in a sale that violates § 408(a).

In so doing, Plaintiff has reversed its position and asks the Court to do the impossible. Essentially, Plaintiff asks the Court to “cut and paste” the joint and several language from 408(b) and, contrary to its express limitations, expand it to alleged violations of other sections of the securities laws. There is simply no support in the statutory scheme or any case for such unprecedented action. One can only presume that it is unprecedented because it directly violates the plain language of the statutes. Simply put, Defendants cannot be held jointly and severally liable for Schubert’s alleged violation(s) of any statutes other than § 408(a) of the Predecessor Act or § 1-509(B) through (F) of the Successor Act: sections which Plaintiff has *confessed* it is not proceeding under.

II.

The source of Defendants’ joint and several liability must be found, if at all, in the substantive provisions of the Oklahoma Securities Act which Plaintiff seeks to enforce. However, when construing a statute that is clear, a court has “no authority to transcend or add to the statute, [and the statute] may not be enlarged, stretched, or expanded, or extended to cognate or related cases not falling within its provisions.” *Id.* (quoting *Huffman v. Oklahoma Coca-Cola Bottling Co.*, 1955 OK 76, 281 P.2d 436, 440) (edits in original). “When the language of the statute is plain, it will be followed without further inquiry . . . [T]he sole function of the courts – at least where the disposition called for by the text is not absurd – is to enforce it [the statute] according to its terms . . . and vigorously resist reading words or elements into a statute that do not appear on its face.” *Oklahoma City Zoological Trust v. State Public Employees Relations Board*, 2007 OK 21, ¶ 6, 158 P.3d 461, 464 (edits in original) (citations and internal quotes omitted).⁴

⁴ Interpretation of securities statutes are no different. See *Touche Ross & Co. v. Redington*, 442 U.S. 560, 99 S.Ct. 2479 (1979) (noting that interpretation of the federal Securities Exchange Act “must begin with the

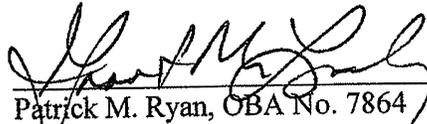
As such, Plaintiff must abide by the express language of a statute just as any other litigant and they are not authorized – by the sheer nature of their office – to add gloss to the plain language of a statute in order to fit their theory of the case. However, Plaintiff apparently views itself differently as they play fast and loose with the statutes and seek joint and several liability against Defendants for Schubert’s alleged violations of statutes (sections 101 and 1-501) that are excluded by the plain language of § 408(b) and § 1-509(G)(5).

Plaintiff even has the audacity to state that its “legal position on the issue of joint and several liability is identical to that of the courts in *Odor v. Rose*, 2008 WL 2557607 (W.D. Okla.), and *Nikkel v. Stifel, Nicolaus & Co., Inc.*, 1975 OK 158, 542 P.2d 1305 . . .” In fact, nothing could be further from the truth. In *Odor*, the court ruled that defendants were jointly and severally liable under 408(b) for materially participating or aiding in the sale of securities in violation of Section 301. The reason for this conclusion was simple: the plain language of § 408(a)(1) makes it unlawful to sell a security in violation of Section 301. Thus, since the defendants in *Odor* aided in the unlawful sale under § 408(a), they were jointly and severally liable. Thus, far from supporting Plaintiff’s position, *Odor* entirely undermines it.

III.

Because Plaintiff has reversed legal positions, Defendants request that the Court reconsider its denial of Defendants’ motion for partial summary judgment. Defendants cannot be held jointly and severally liable for Marsha Schubert’s alleged violations of 71 O.S. §§ 101 and 1-501. Since Plaintiff failed to establish that Defendants retained any Investors Assets belonging to the short investors, restitution is an inappropriate remedy.

language of the statute itself . . .” and “generalized references to the ‘remedial purposes’ of the Act will not justify reading a provision more broadly than its language and the statutory scheme reasonably permit”). See also *Nikkel v. Stifel, Nicolaus & Co., supra*. (rejecting plaintiff’s attempt to enlarge the class of persons liable under 71 O.S. § 408(a) beyond those class of persons expressly defined in the statute).



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CERTIFICATE OF SERVICE

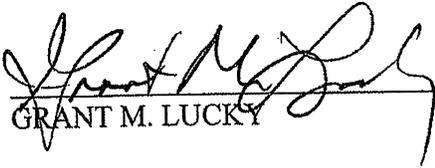
I hereby certify that on this 23RD day of January 2009, a true and correct copy of the above and foregoing instrument was mailed, via U.S. First Class Mail, postage prepaid, to the following counsel of record:

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