

**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. )

FILED IN THE DISTRICT COURT  
OKLAHOMA COUNTY, OKLA.

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PATRICIA FRESLEY, COURT CLERK  
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DEPUTY

**DEFENDANTS' BRIEF IN SUPPORT OF OUTSTANDING DISCOVERY ISSUES**

COMES NOW Defendants Farmer & Merchants Bank, Farmers & Merchants Bancshares, Inc., John V. Anderson and John Tom Anderson ("Defendants") and respectfully submit their Brief in Support of Outstanding Discovery Issues with the Oklahoma Department of Securities ("ODS") and the Intervenors. In support hereof, Defendants would show the Court as follows:

**I. Preliminary Statement**

The fundamental purpose of Oklahoma's securities laws is to protect persons making investment decisions from manipulative and deceptive practices by assuring adequate and accurate information is provided to investors prior to the sale of a security. Investor concerns are triggered by the presence of an investment decision brought about by any set of circumstances in which a purchaser alters their economic position in reliance upon material

statements made by the seller. For this reason, Oklahoma has created civil liability not only for those who sell securities by means of material misstatements, but it also extends liability to those who materially aid or participate with the seller in the sale of securities by means of material misstatements.

In this case, there is no allegation or evidence that the Defendants provide advice or analysis on securities or that they engage in the regular activities of the securities markets. Similarly, since Defendants are not in the business of selling securities, there is no allegation that Defendants are in a position to exaggerate and fraudulently overstate the prospects and earnings capabilities to uninformed purchasers. Further, there is no allegation that Defendants actually participated or aided in the allegedly fraudulent sales transactions entered into between Marsha Schubert and the Loser Investors. Marsha Schubert simply had a depository account at F&M Bank, like thousands of other bank customers, and also borrowed money from F&M Bank, like thousands of other bank customers.

Based solely upon Schubert's status as a customer and borrower at F&M Bank, both ODS and the Intervenors in this case have sued Defendants for conduct that does not amount to a violation of Oklahoma's securities laws. After the case was filed, Defendants served discovery requests on ODS and the Intervenors in an effort to discover relevant information relating to the investment activities of the Loser Investors. Their deficient discovery responses attempt to deprive Defendants of relevant information demonstrating, among other things, how these Loser Investors were not damaged in any way by the actions of the Defendants. Accordingly, Defendants respectfully submit this brief to the Court for the purpose of apprising the Court of the outstanding issues between the parties relating to the

scope of discovery, as framed by the pertinent law and the Intervenor's and ODS' responses to Defendants' discovery requests.

## II. Legal Standards Governing Discovery

Under Oklahoma's Discovery Code, a party "may obtain discovery regarding *any* matter, not privileged, which is relevant to the subject matter involved in the pending action . . ." 12 O.S. § 3226(B)(1); *see also Nitzel v. Jackson*, 1994 OK 49, 879 P.2d 1222, 1223 ("Title 12 O.S. § 3226(B)(1) allows discovery of any unprivileged relevant information").<sup>1</sup>

As the United State Supreme Court has recognized:

The key phrase in this definition – relevant to the subject matter involved in the pending action – has been construed broadly to encompass any matter that bears on, or that could reasonably lead to other matter that could bear on, any issue that is or may be in the case. Consistently with the notice-pleading system established by the Rules, discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues. Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits.

*Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 S.Ct. 2380, 2389 (1978) (citations and internal quotations omitted).<sup>2</sup>

Similarly, in construing this language, the Oklahoma Supreme Court has consistently recognized that "[t]he purpose of modern discovery practice and procedure is to promote the discovery of true facts and circumstances of the controversy, rather than to aid in their concealment." *Boswell v. Schultz*, 2007 OK 94, ¶ 14, 175 P.3d 390, 395 (citing *State ex rel. Remington Arms Co., Inc. v. Powers*, 1976 OK 103, ¶ 4, 552 P.2d 1150. For this reason, discovery rules "are to be given liberal construction," *Id.*, so that "legal resolution of the

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<sup>1</sup> The statute further provides that discovery is not limited to matters that will be admissible at trial so long as the information sought "appears reasonably calculated to lead to the discovery of admissible evidence."

<sup>2</sup> The Oklahoma Discovery Code closely tracks the Federal Rules of Civil Procedure, so federal decisions provide guidance. *West v. Cajun's Wharf, Inc.*, 1988 OK 92, ¶ 13, 770 P.2d 558, 562.

dispute may be rested upon full revelations rather than on facts that are partially obscured.” *State ex rel. Oklahoma Barr Ass’n v. Lloyd*, 1990 OK 14, ¶ 14, 787 P.2d 855, 859.

Contrary to the positions taken by ODS and the Intervenors, civil discovery is not conducted in the dark. The liberal discovery rules permit “parties to obtain the fullest possible knowledge of the issues and facts before trial . . . [in order to] to make a trial less a game of blind man’s bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.” *State ex rel. Protective Health Services v. Billings Fairchild Center, Inc.*, 2007 OK CIV APP 24, ¶ 17, 158 P.3d 484, 489 (citations and internal quotations omitted). Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes. *Seattle Times Co. v. Rhinehart*, 104 S.Ct. 2199, 2208, 467 U.S. 20, 34 (1984). The dual goals served by liberal discovery – ascertainment of the truth and disposition of the case – can only be fulfilled “when parties are well educated through discovery as to their respective claims in advance of trial.” *Remington Arms Co., supra*.

In order to ensure that parties obtain the fullest possible knowledge of the issues and facts involved in litigation, good faith compliance with pre-trial discovery procedures is “both desirable and necessary.” *Id.* Unfortunately, that has not happened in this case. Both the Department of Securities and the Intervenors have refused to provide information and materials that bear on, or that could reasonably lead to a matter that could bear on, issues that are or may be involved in this case.

### **III. The Intervenor's Have Refused to Produce Discoverable Information**

#### **A. Liability Under The Oklahoma Securities Act**

The legal basis for the Intervenor's lawsuit against Defendants stems from 71 O.S. § 408 (of the Predecessor Act) and 71 O.S. § 1-509 (of the Successor Act). Under the Predecessor Act, a person commits a violation of Oklahoma's securities laws if he or she "materially participates or aids in a sale made by any person liable under [§ 408(a)(1) or (2)]. . . ." In order to establish that a particular defendant materially participated or aided in the fraudulent sale of securities, the plaintiff must show two things: "(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)." *Southwestern Oklahoma Development Authority v. Sullivan Engine Works, Inc.*, 1996 OK 9, 910 P.2d 1052, 1058. Thus, "the liability of the seller is a prerequisite for there to be liability as to one materially participating or aiding in the sale." *Nikkel v. Stifel, Nicolaus & Co.*, 1975 OK 158, 542 P.2d 1305, 1307.

Under this standard, a transactional predicate must be shown in order to establish the Defendants' violation of the securities laws. That is, both the Intervenor and ODS must establish that Schubert is liable under 71 O.S. § 408(a)(2) and/or 71 O.S. § 1-509(B)<sup>3</sup> for selling a security to each of the Loser Investors "by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading (the other party not knowing of the untruth or omission)." After establishing that Schubert made an unlawful sale, extension of liability to those who materially aid or participate in the

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<sup>3</sup> Similarly, under the Successor Act, a person commits a violation of Oklahoma's securities laws if he or she "materially aids in the conduct giving rise to the liability under subsections B through F . . ." 71 O.S. §1-509(G)(5). Subsection B reads substantially similar to § 408(a)(2) of the Predecessor Act, making it a violation of the securities laws to sell a security by means of an untrue statement of material fact.

conduct giving rise to liability is anchored in the actual sales transaction between the Loser Investors and the culpable seller, Marsha Schubert. Put simply, there must be a sale by means of an untrue statement of material fact and the Defendants must have sufficiently participated with the seller in that unlawful transaction.

Based upon the foregoing, it is clear that a primary area of discovery in this case involves the facts and circumstances surrounding each of the allegedly unlawful sales transactions between Marsha Schubert and the Loser Investors, including the Intervenors. This broad area involves a number of constituent considerations relating to the Intervenors' conduct, including, but not limited to: (1) the nature of the Intervenors' relationship with Marsha Schubert; (2) the process leading up to and/or bringing about the Intervenors' investment decisions with Marsha Schubert; (3) the form and content of Marsha Schubert's alleged misrepresentations to the Intervenors, including the generality or specificity of the alleged misrepresentations; (4) the causal connection between the alleged misrepresentation and the Intervenors' harm; (5) the Intervenors' knowledge of Schubert's improper conduct; (6) the Intervenors' actions upon learning about Schubert's conduct and their investments with her; (7) the proximate cause of the Intervenors' loss; (8) the Intervenors' access to relevant information; (9) the sophistication and expertise of the Intervenors in financial and securities matters; (10) any opportunities by the Intervenors to detect impropriety; and (11) any information possessed by the Intervenors sufficient to call into question any material misrepresentations made by Marsha Schubert.

In response to Defendants' discovery requests relating to the above matters, the Intervenors objected to nearly every single interrogatory and/or request for production. *See Intervenors' Response to Defendants' First Requests for Production of Documents and*

*Intervenors' Answer to Defendants' First Set of Interrogatories*, attached hereto as Exhibits "1" and "2". Specifically, the Intervenors asserted that the requested information and documents are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. However, given the liberal construction given to civil discovery rules as well as the relevant law, such a position is simply untenable and is not a proper basis for refusing to produce the requested information.

**B. Relevance of investor conduct under the statute of limitations of the Oklahoma Securities Act**

Under 71 O.S. § 1-509(J)(2) of the Successor Act, an action seeking anti-fraud relief must be brought "within the earlier of two (2) years after discovery of the facts constituting the violation or five (5) years after such violation."<sup>4</sup> This "discovery of the facts" provision is phrased identically to the federal statute of limitations governing securities actions. *See, e.g.*, 28 U.S.C. § 1658(b). While the Oklahoma appellate courts have not yet ruled on what constitutes a "discovery" for purposes of Oklahoma's securities laws, an extensive body of federal case law has construed the counterpart language in federal securities laws. The Oklahoma courts have consistently looked to such federal authority in construing Oklahoma's Act. *See, e.g., State ex rel. Day v. Southwest Mineral Energy, Inc.*, 1980 OK 118, ¶¶ 10-16, 617 P.2d 1334, 1336-37; *Adams v. Smith*, 1986 OK CIV APP 32, ¶ 12, 734 P.2d 843, 845 ("we find highly persuasive the federal cases determining this issue in relation to both federal and state limitation periods").

Under federal securities law, a violation is "discovered" whenever an investor is put on "inquiry notice." *Sterlin v. Bioimmune Systems*, 154 F.3d 1191, 1201-02 (10<sup>th</sup> Cir. 1998).

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<sup>4</sup> Similarly, the Predecessor Act requires that an action seeking anti-fraud relief be brought within two (2) years after the discovery of the untruth or omission, but in no event more than three (3) years after the sale. 71 O.S. § 408(f).

Inquiry notice exists whenever there are “sufficient storm warnings to alert a reasonable person to the possibility that there were either misleading statements or significant omissions involved in the sale.” *Sterlin*, 154 F.3d at 1196. Once inquiry notice has been triggered, it is an investor’s duty to exercise reasonable diligence and the statute of limitations begins to run “once the investor, in the exercise of reasonable diligence, should have discovered the facts underlying the alleged fraud.” *Id.* at 1201. The Oklahoma appellate courts have applied the inquiry notice standard in evaluating limitations defenses in other contexts, including common law securities fraud. *See, e.g., Roberson v. PaineWebber, Inc.*, 2000 OK CIV APP 17, ¶ 7, 998 P.2d 193, 197. There is every reason to believe that the Oklahoma courts would apply the same inquiry notice standard – and its corresponding focus on the investor’s exercise of reasonable diligence – in evaluating limitations under Oklahoma’s securities laws.

In determining whether an investor was placed on inquiry notice of a possible violation, the courts have considered both the sophistication of the particular investor and the reasonableness of that investor’s handling of the investments at issue. For example, in *Ebrahimi v. E.F. Hutton & Co.*, 852 F.2d 516 (10<sup>th</sup> Cir. 1988), an investor challenged unauthorized trading on his brokerage account. The court found the claim to be time-barred because the investor had received monthly statements and confirmation notices on all of the challenged trades, even though he had failed to read these statements for several years. The statements “would have alerted the investor, at the very least, that something may have been amiss.” *Id.* at 523 (internal quotes omitted).<sup>5</sup>

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<sup>5</sup> *See also Norriella v. Kidder Peabody & Co.*, 752 F.Supp. 624, 628 (S.D.N.Y. 1990)(“plaintiffs’ duty of inquiry was triggered by the receipt of confirmation slips and monthly accounts detailing every trade”).

Similarly, in *Davis v. Birr, Wilson & Co.*, 839 F.2d 1369 (9<sup>th</sup> Cir. 1988), the court considered a limitations defense asserted against a plaintiff who challenged certain investments made by his broker. The investments had been disclosed in monthly statements and confirmation slips sent to the plaintiff. The court found that the plaintiff was “well-educated and had recently invested large sums of money with other brokers.” Because the plaintiff was “an experienced and sophisticated investor,” the court found that the statements and confirmation slips placed him on inquiry notice of the alleged fraud. *Id.* at 1370.

Under the inquiry notice standard, the sophistication of the investor, including the investor’s experience with other investments, is certainly relevant and discoverable under Oklahoma’s Discovery Code. Moreover, the investors’ exercise of reasonable diligence – including, but not limited to, the way that the investor responded to information, or lack of information, about the challenged investment(s) – is equally probative and discoverable. Therefore, the Intervenor should be ordered to produce any and all discoverable information requested by Defendants relating to their investments with Marsha Schubert as well as their investments with other brokers, investment advisors, etc.

**C. Relevance of investor conduct under the anti-fraud provisions of the Oklahoma Securities Act**

**1. Knowledge**

Not only is investor conduct and sophistication relevant for purposes of applying the limitations period under Oklahoma’s securities laws, but it is also relevant for determining whether the Intervenor knew that the information provided to them by Marsha Schubert was false, misleading, and/or material. Under both the Predecessor and Successor Acts, an investor cannot recover damages for a violation of the anti-fraud provisions unless he or she did not know of the alleged untruth or omission. In other words, a dissatisfied investor

cannot recover for a poor investment decision on the basis of a broker's alleged omission or misstatement where he or she had knowledge of the untruth or omission but simply chose to ignore it.

The sophistication and expertise of the Intervenor in financial and securities matters and their access to relevant information are critically important facts in determining whether the Intervenor knew the truth, untruth, or materiality of Marsha Schubert's alleged misrepresentations. Not surprisingly, Intervenor wish to deprive Defendants of this relevant information and have steadfastly refused to produce information pertaining to their wealth, investment experience, professional status, business background, and access to extrinsic sources of sound business, accounting, and investment advice. "A sophisticated investor requires less information to call a misrepresentation into question than would an unsophisticated investor. Likewise when material information is omitted, a sophisticated investor is likely to know enough so that the omission still leaves him cognizant of the risk." *Banca Cremi, S.A. v. Alex Brown & Sons, Inc.*, 132 F.3d 1017, 1028-29 (citation and internal quotes omitted). Thus, Intervenor should be ordered to produce any and all discoverable information requested by Defendants relating to their investment history, contacts with brokerage houses, discussions with investment and accounting professionals regarding said investments, and/or other relevant information that touches upon the issue of whether Intervenor were aware of the truth, untruth, and/or materiality of Marsha Schubert's alleged misrepresentations.

**2. Causal connection between Intervenor's harm and Defendants' conduct**

The Intervenor's conduct in each allegedly unlawful sale is also relevant to the question of whether Defendants caused the Intervenor's harm. For instance, in *Howell v.*

*Ballard*, 1990 OK CIV APP 92, 801 P.2d 127, plaintiff claimed that Tate-Page Enterprises (TPE) sold him an unregistered security and that Defendants Tate and Ballard “materially participated and aided in that sale.” *Id.* at 128. The facts of the case demonstrated that Tate and Ballard “took part” in a number of meetings involving the formation of a business enterprise which was to be run by TPE. However, Tate and Ballard claimed that they did not “materially participate” in the sale of the subject business interest, arguing that the sale was solely between plaintiff and TPE. However, the Court found that the deposition testimony “clearly reflect[ed] that **each participated in the solicitation and negotiation stages of the business transaction with [Plaintiff] which led to his investment.**” *Id.* at 129 (emphasis added). By noting that the defendants’ participation in the sale “led to [the Plaintiff’s] investment” the court found that there must be a causal connection between the defendant’s conduct and the plaintiff’s harm. In other words, the defendants’ participation in the sale must have influenced or induced the buyer to purchase the security.

Similarly, in *Franke v. Midwestern Oklahoma Development Authority*, 428 F.Supp. 719 (W.D. Okla. 1976), plaintiff asserted a claim under § 408(b) against a law firm – Smith, Leaming – for their alleged material participation in the fraudulent sale of industrial revenue bonds. Plaintiff alleged that certain material facts were withheld from plaintiff in connection with the sale of securities to plaintiff. Smith, Leaming’s participation in the transaction was limited to providing an opinion as to the issuer’s lawful organization and other legalities pertaining to the issuance of the bonds. The trial court held as follows:

The facts also show that Smith, Leaming as a matter of law did not materially participate or aid in the sale of the bonds to the instance plaintiff. This plaintiff never met Leaming; he paid for his Chill Can Bonds before he received any information about them; and he received the bonds before he read Smith,

Leaming's opinion. The requirement of material participation on the part of these defendants, 71 O.S. § 408(b), is lacking.

*Id.* at 726. The *Franke* case illustrates that a defendant's personal participation in the underlying sales transaction is an important factor and also that a court will look at a defendant's conduct in relation to a plaintiff's decision to invest in the securities. In other words, if the facts upon which a particular defendant's liability is based do not affect an investor's decision to purchase a security, a defendant cannot be held liable for material participation. The defendants in *Franke* simply were not a part of the sales transaction and did nothing to induce plaintiff to purchase their securities.<sup>6</sup>

Similar cases outside of Oklahoma are in accord. For instance, in *Luallin v. Koehler*, 644 N.W.2d 591 (N.D. 2002), the North Dakota Supreme Court had occasion to analyze its own securities statute, which prohibits participation or aid in the unlawful sale of securities. In *Luallin*, plaintiffs were investors who invested in oil and gas partnerships. Defendant Condor "provided geological and engineering information to [the sellers] to enable them to decide whether to purchase interests in various oil and gas drilling ventures in North Dakota." *Id.* at 593. Plaintiffs claimed that Condor participated with the sellers in the fraudulent sale of partnerships and failed to register those securities in North Dakota.

The court first noted that a legal determination of "participation or aid" in making a sale of securities "is determined upon the facts of each case and not by a fixed rule of law." *Id.* at 596 (citing *Schollmeyer v. Saxowsky*, 211 N.W.2d 377, 381 (N.D. 1973)). While the court eschewed any fixed rule of law in its analysis, it gave critical and dispositive importance to the fact that defendant Condor did "not involve itself in the activities of selling

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<sup>6</sup> Activities that occur after the sale of a security cannot form the basis of liability under the Oklahoma securities fraud statutes. See *Seattle-First National Bank v. Carlstedt*, 678 F.Supp. 1543, 1547-1548 (W.D. Okla. 1987).

the . . . limited partnerships.” *Id.* at 597. That is, it was the “selling process” that triggered concerns for investor protection. The court distinguished cases from other jurisdictions on grounds that the participant’s activities were “directly related to the solicitation of investors and to the sale of securities.” *Id.* Whereas, in the facts before the court:

Condor never had any communication or contact with any of the plaintiff investors prior to their investing in the Whitworth and Williston partnerships. By merely providing information to Whitworth and Williston [the sellers], Condor did not participate in soliciting investors or aid in making sales of the limited partnership interests.

*Id.* at 597-598. Accordingly, the court upheld the trial court’s conclusion that defendant Condor was not subject to liability – jointly and severally with the seller – since it did not participate or aid in the securities sale.

State and federal courts in Florida have also interpreted Florida’s statute, which prohibits personal participation or aid in the fraudulent sale of securities. In *Sorenson v. Elrod*, 286 F.2d 72 (5<sup>th</sup> Cir. 1960), Sorenson brought suit against a bank for its alleged participation in sales made in violation of Florida’s securities statute. Specifically, defendant Elrod offered “points of participation” in a venture involving lands which were misrepresented as sound investments. *Id.* at 73. The sales material directed that the checks be made payable to defendant Bank of Miami Beach, and sent to Elrod.

The Fifth Circuit affirmed the district court’s ruling that the bank did not personally participate or aid in the sale of securities. The court first noted that the Supreme Court of Florida interpreted the relevant statutory language as implying “some activity in inducing the purchaser to invest.” *Id.* at 74 (citations omitted). In light of this interpretation, the court stated that “[t]he permission of the Bank, whether express or tacit, to the use of its name was not the taking of an active part in influencing the appellant to purchase.” *Id.* The court also,

in response to a separate claim that the bank committed common law fraud by virtue of the fraudulent representations made by the seller, held that:

[T]hese representations were not made by the Bank and it received no benefit from them. The benefits incidental to the receipt of deposits are not such, in this case, as made the Bank a party to the fraud. Banking is an occupation not without its hazards, but we do not think it is exposed to the risk of having guaranteed the veracity or integrity of a customer whose funds it is willing to receive where it has done no more than to permit itself to be held out as a depository.

*Id.* Consequently, the Bank was **not** found liable in fraud.

Finally, in a more recent Florida decision, *Dillon v. Axxsys International, Inc.*, 385 F.Supp.2d 1307 (M.D. Florida 2005), a federal district court had occasion to revisit the above cases and the Florida securities act's prohibition against personal participation in fraudulent sales. In *Dillon*, defendant Austin was a vice-president of Axxsys. Axxsys was formed by Austin and others in order to acquire local and regional internet service providers. Plaintiffs, who purchased unregistered common shares in Axxsys, sued Austin and claimed that she personally participated in the sale of unregistered securities to them. Plaintiffs primarily relied on Austin's attendance at a dinner meeting where salesmen employed by Axxsys discussed the business venture with plaintiffs.

According to plaintiffs' theory of their case, Austin's attendance constituted an "essential link in the chain of inducing Plaintiffs to purchase." *Id.* at 1310. Citing *Sorenson*, the court initially observed that Florida's interpretation of "personal participation or aid in making the sale" implies some form of activity in inducing the purchaser to invest. "In other words, the officer must actively and directly, rather than passively, derivatively, or by attribution or imputation, influence or induce the investor to buy." *Id.* at 1311.

The court found no such evidence in the facts before it. While Austin energetically participated in the business of Axxsys, she did not personally participate in the sale of securities to plaintiffs, which is the triggering event for liability under the statute. In other words, the Court refused to blur the distinction between a defendant's participation in a seller's business with a defendant's participation in the sale of a security. It stated:

[T]he plaintiffs' elaboration of Austin's involvement with the creation and furtherance of the business of Axxsys is irrelevant to the question of whether she is liable under Section 517.211(2) as a person who made the sale or a person who participated or aided in the sale (she is neither) . . . The fact is that Austin had nothing to do with the sale; the question under Section 517.211(2) ends there.

*Id.* at 1313. Thus, the court granted judgment as a matter of law to Austin since plaintiffs offered "no evidence that Austin influenced [plaintiffs'] participation in the business endeavor." *Id.* at 1316.

#### **IV. ODS Has Refused to Produce Discoverable Information**

Defendants also served ODS with discovery requests that were aimed, in part, upon discovering: (1) how Defendants in any way materially participated and/or aided in Schubert's unlawful sales transactions with the Loser Investors; and (2) how the Loser Investors were damaged in any way by Defendants. *See Defendants' First Set of Interrogatories* (Nos. 2, 3, 8-18), attached hereto as Exhibit "3" and *Defendants' First Request for Production of Documents* (Nos. 1, 48, 50, 51), attached hereto as Exhibit "4." Such basic information goes to the very heart of ODS's burden of proof in this case against Defendants and is certainly discoverable by Defendants under Oklahoma's Discovery Code.

In response, however, ODS objected to producing the requested information. *See Plaintiff's Response to Defendants' First Set of Interrogatories and Plaintiff's Response to*

*Defendants' First Request for Production of Documents*, attached hereto as Exhibits "5" and "6." Notably, unlike the Intervenor, ODS did not object to answering the interrogatories or producing the documents on grounds that the information sought was either irrelevant or not reasonably calculated to lead to the discovery of admissible evidence. Rather, ODS claimed that it "does not represent individual investors in its enforcement actions and is not seeking an order of restitution against the Defendants in this matter 'on behalf' of any person. Second, ODS claimed that the information was not requested from the Loser Investors and that the Loser Investors were not within or under the control of ODS.

Thus, not only does ODS assert that it does not have the requested information – which goes towards their burden of proof in this case and must be gathered in preparation of their case – within its possession, but it also has no duty to retrieve such information from the Loser Investors since ODS is not seeking restitution on behalf of the Loser Investors and since the Loser Investors are not under the control of ODS. Further, ODS suggests that the Defendants must do their work for them by stating that "[i]t is Defendants' responsibility to subpoena pertinent third parties for their information." *See Exhibits 5 and 6.*

Irrespective of whether ODS "represents" the Loser Investors, ODS is the plaintiff in this case and is seeking relief based upon Defendants' alleged participation in unlawful sales transactions between the Loser Investors and Marsha Schubert. ODS is not immune from the requirements and duties imposed by the Oklahoma Discovery Code. Defendants are entitled to know the factual basis and documents that support ODS's claims against them and that relate to the subject matter of the action, and ODS is obligated to provide Defendants with answers and information that are within its care, custody, or control.

Under 12 O.S. § 3234(A)(1), a party is obligated to produce documents which are in its “possession, custody or control.” Similarly, a party answering interrogatories must “furnish such information as is available to that party.” 12 O.S. § 3233(A). In this regard, Oklahoma law prohibits a party answering interrogatories or responding to document requests from ignoring information under the party’s control. In *State ex rel. Protective Health Services v. Billings Fairchild Center, Inc.*, 2007 OK CIV APP 24, ¶ 19, 158 P.3d 484, 490, the court noted that a “Court should not permit [discovery responses] that are incomplete, inexplicit and unresponsive . . . The answering party cannot limit his answers to matters within his own knowledge and ignore information immediately available to him or under his control.”<sup>7</sup> (quoting *Miller v. Doctor’s General Hosp.*, 76 F.R.D. 136 (W.D. Okla. 1977); see also *Milner v. National School of Health Technology*, 73 F.R.D. 628, 632 (D.C. Pa. 1977) (noting that a party cannot plead ignorance to information that is from sources within its control); *Essex Builders Group, Inc. v. Amerisure Insurance Company*, 230 F.R.D. 682, 685 (M.D. Fla. 2005).

In federal courts, the concept of “control” has a firmly entrenched meaning in discovery matters. Oklahoma courts have found such federal authority persuasive in construing the Oklahoma Discovery Code. See, e.g., *Hall v. Goodwin*, 1989 OK 88, ¶ 7, 775 P.2d 291, 293 (“Because Oklahoma obtained its discovery code from the Federal Rules of Civil Procedure, we will examine the federal cases construing Rule 26”). “[C]ontrol does not require that the party have legal ownership or actual physical possession of the documents at issue.” *The Bank of New York v. Meridien Biao Bank Tanzania Limited*, 171 F.R.D. 135 (S.D.N.Y. 1997). Rather, consistent with the liberal construction given discovery rules,

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<sup>7</sup> Under 12 O.S. § 3234(A)(1) permits a party to serve on any other party a request to produce documents “which are in the possession, custody or *control* of the party upon whom the request is served.”

“control has been construed broadly by the courts as the legal right, authority, or practical ability to obtain the materials sought upon demand.” *S.E.C. v. Credit Bancorp, Ltd.*, 194 F.R.D. 469, 471 (S.D.N.Y. 2000); accord *U.S. International Trade Commission v. Asat, Inc.*, 411 F.3d 245, 254 (D.C. Cir. 2005). In other words, if the producing party has the legal right or ability to obtain the requested information, “then it is deemed to have ‘control,’ even if the documents are actually in the possession of a non-party.” *In re Flag Telecom Holdings, Ltd. Securities Litigation*, 236 F.R.D. 177, 180 (S.D.N.Y. 2006).

ODS has the legal right, authority, and/or practical ability to obtain from the Loser Investors the information sought by Defendants. The Loser Investors, who will directly benefit if ODS should prevail in the action, have strong economic incentives to cooperate with ODS. Those economic incentives show that ODS has the practical ability to obtain documents and information from the investors. Because ODS has made no effort whatsoever to secure the Loser Investors’ cooperation, its non-responses have violated the Oklahoma Discovery Code.

Moreover, in addition to having the practical ability to secure the requested documents and information, ODS has the legal right and authority to secure them. That is, ODS is vested by law with the right and power to:

Require or permit a person to testify, file a statement, or produce a record, under oath or otherwise as the Administrator determines, as to all the facts and circumstances concerning a matter to be investigated or about which an action or proceeding is to be instituted; and

For the purpose of an investigation or proceeding under this act, the Administrator or its designated officer may administer oaths and affirmations, subpoena witnesses, seek compulsion of attendance, take evidence, require the filing of statements, and require the production of any records that the Administrator considers relevant or material to the investigation or proceeding.

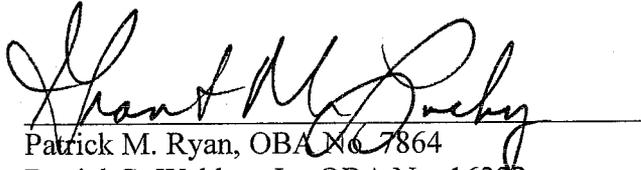
71 O.S. § 1-602(A)(2) and (B). ODS initiated an investigation and filed a district court proceeding against Defendants for their alleged securities violations. Accordingly, ODS has the right, authority, and/or practical ability to obtain records, statements, and other records from the Loser Investors. For ODS to assert that this information is not within its control – where it has made no effort to use its authority under section 1-602(A)(2) to obtain the requested documents and information from the Loser Investors – is an inaccurate statement under the extant law and this Court should order ODS to produce the requested information to Defendants.

Finally, ODS has refused to produce a number of documents based upon various grounds of privilege. *See* Exhibit “6,” Nos. 3-13, 15, 18, 20, 22-24, 26, 32-34, 36, 40-41, and 54. To each of these specific requests, ODS asserted that the documents were protected from disclosure by 71 O.S. § 1-607, 12 O.S. § 2502(B)(3), the deliberative process privilege, the work product doctrine, and /or the attorney client privilege. However, ODS has wholly failed to support its allegations of privilege with facts necessary to adjudicate the asserted privileges. When an asserted privilege lacks the specificity needed to adjudicate the asserted privilege, the district court has a duty under 12 O.S. § 3237(A) to order the preparation and service of a privilege log that includes: (1) the author or authors; (2) the recipient or recipients; (3) its origination date; (4) its length; (5) the nature of the document or its intended purpose; and (6) the basis for the objection. *See also Scott v. Peterson*, 2005 OK 84, 126 P.3d 1232. Therefore, based upon the foregoing, Defendants respectfully request that the Court order ODS to provide a privilege log in support of their claims of privilege.

**CONCLUSION**

Based upon the foregoing brief, Defendants respectfully request that the Court order ODS and the Intervenor to produce the requested information, documents, and privilege log, and for such other relief as this Court finds just and equitable.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

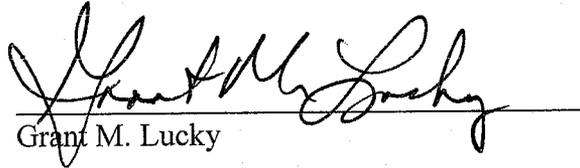
I hereby certify that on this 1<sup>ST</sup> day of August 2008, a true and correct copy of the above and foregoing instrument was mailed, via U.S. Mail, first-class, postage prepaid, to the following attorneys of record:

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