

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

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.)

MAY 20 2008

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Case No. CJ-2006-3311

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**DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT
AND BRIEF IN SUPPORT THEREOF**

Patrick M. Ryan, OBA No. 7864
Daniel G. Webber, Jr., OBA No. 16332
Matthew C. Kane, OBA No. 19502
Grant M. Lucky, OBA No. 17398
RYAN WHALEY COLDIRON SHANDY PC
900 Robinson Renaissance
119 North Robinson
Oklahoma City, Oklahoma 73102
Telephone: (405) 239-6040
Facsimile: (405) 239-6766

**ATTORNEYS FOR DEFENDANTS
FARMERS & MERCHANTS BANK,
FARMERS & MERCHANTS BANCSHARES,
INC., JOHN V. ANDERSON and JOHN TOM
ANDERSON**

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**DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT
AND BRIEF IN SUPPORT THEREOF**

Defendants Farmers & Merchants Bank, Farmers & Merchants Bancshares, Inc., John V. Anderson and John Tom Anderson (collectively referred to as "Defendants") respectfully move this Court to grant this Motion for Partial Summary Judgment ("Motion") against Plaintiff, Oklahoma Department of Securities ("ODS"). In support hereof, Defendants submit the following Brief in Support of its Motion.

INTRODUCTION

ODS's civil enforcement action against the Defendants in this case is unusual and unprecedented on a variety of levels. The Defendants are a state chartered bank (referred to herein as "F&M") and certain individual officers of F&M, all of whom are located in Crescent, Oklahoma. As a state chartered bank, the Defendants' banking operations are not subject to ODS's supervision or regulation. This is so because the Defendants are not members of a national securities association, nor are they licensed or registered to conduct securities related business in Oklahoma or elsewhere. The Defendants do not provide advice or analysis on securities; Defendants do not provide research or opinions on securities or securities markets; and Defendants do not receive compensation in any form for providing advice on securities. Simply put, Defendants are not engaged in the regular activities of the securities industry and, therefore, are neither regulated by ODS nor subject to ODS scrutiny, investigation and enforcement based upon standards solely applicable to registered securities professionals.

Despite the foregoing, ODS has filed this civil enforcement action against Defendants based upon allegations that Defendants violated Oklahoma's securities laws through their failure to comply with routine and normal banking practices in handling the banking matters

of one of its customers, Marsha Schubert ("Schubert").¹ Schubert was a licensed broker-dealer agent and investment adviser representative of AXA Advisors, LLC ("AXA").² Acting in this capacity, Schubert purportedly operated a Ponzi scheme in which Schubert, promising large financial returns to her investors, accepted money from them and represented that their money would be invested in options contracts or used to "day trade." However, most of the money given to Schubert by her investors was not invested in legitimate investments, but was *paid to other investors* as purported returns on their non-existent investments. Schubert's Ponzi scheme operated under the very nose of AXA, and ODS has not taken any administrative or civil action against AXA based upon its failure to properly supervise the activities of Schubert.

Rather, ODS apparently views Defendants as the insurer for Schubert's scheme and has sued Defendants for their allegedly material aid/participation in Schubert's Ponzi scheme, and has requested that the Court order Defendants to pay restitution to those investors of Schubert who suffered damages as a result of participating in Schubert's Ponzi scheme (the so-called "Loser Investors"). ODS, however, does not allege that the Defendants actually participated in the allegedly fraudulent sales transactions Schubert entered into with her investors. At bottom, ODS simply alleges that if Defendants had complied with normal and routine banking practices, Schubert's Ponzi scheme perhaps

¹ The governmental agency that actually regulates the Defendants' activities and who presumably is more familiar with routine and normal banking practices has not filed any administrative action against Defendants for the purported violations of what ODS has termed "routine and normal banking practices."

² As licensed securities professionals, ODS regulated the registration matters, qualification requirements, examination issues and ethical standards for both Schubert and AXA. Under ODS's rules and regulations, AXA was charged with *final* responsibility for proper supervision of Schubert. Among other things, AXA was required to: (1) maintain and enforce procedures for assuring Schubert's compliance with applicable securities laws, rules, regulations and statements of policy promulgated by ODS; and (2) review the activities of Schubert and periodically examine customer accounts to detect and prevent irregularities or abuses. AXA abdicated these responsibilities with respect to Schubert and has done so with impunity from ODS.

would have come to light sooner and perhaps some of the investors in Schubert's Ponzi scheme might not have invested with her. Such allegations, however, do not establish a violation of Oklahoma's securities laws.

In addition to suing Defendants based upon allegations that do not amount to violations of Oklahoma law, this lawsuit is also unusual for the reason that gives rise to Defendants' Motion for Partial Summary Judgment. That is, ODS admittedly has no authority to award damages to wronged investors through an administrative proceeding or otherwise. Since ODS has no authority to award damages for alleged violations of Oklahoma's securities law, it has filed this lawsuit and requested that the Court – through the equitable remedy of restitution – order that Defendants pay damages to those persons who lost money in Schubert's Ponzi scheme. However, as explained herein, restitution has a definite meaning and application under Oklahoma's common law: one which is not based upon compensating a plaintiff for their damages/losses, but is based upon and measured by a defendant's unjust enrichment. By invoking the equitable jurisdiction of this Court and seeking a restitutionary remedy against Defendants, ODS must live by the rules governing the application of restitution as an equitable remedy. As will be shown, ODS has not and cannot carry this burden since Defendants were not unjustly enriched at the expense of those investors who lost money in Schubert's Ponzi scheme.

In the alternative, even if the Court were to rule that restitution, *vis-à-vis* the Loser Investors' damages, is a proper remedy in this case, ODS is not the real party in interest to sue for the recovery of damages. ODS has made clear through its discovery responses and other communications that (1) it is not seeking an order of restitution "on behalf" of the investors who lost money in Schubert's Ponzi scheme; and (2) in the event that ODS and

Defendants resolve ODS's claims against Defendants for restitution, ODS cannot provide Defendants with a release that would forever discharge Defendants from any and all damage claims arising out of the same acts. Based upon these representations, ODS is not the real party in interest under Oklahoma law and Defendants are entitled to partial summary judgment on that issue.

Moreover, ODS has also asserted that it has no obligation to retrieve discoverable information (not already in its possession or control) from those persons who lost money in Schubert's investment scheme. Such an unusual assertion does not square with any recognizable notion of discovery in a civil case. On the one hand, ODS is requesting that Defendants pay investors who lost money in a scheme that Defendants had nothing to do with and, on the other hand, ODS asserts that Defendants have no right to discovery through ODS in order to demonstrate how these investors were not damaged by any actions of the Defendants. ODS's strange view, if taken to its logical conclusion, leaves ODS with no burden of proof relative to its claims and also deprives Defendants of asserting defenses they would be otherwise be entitled to assert if the action was brought by the individual Loser Investors. Consequently, ODS is not the real party in interest and Defendants are entitled to partial summary judgment in that regard.

STATEMENT OF UNDISPUTED FACTS

1. Schubert was a registered broker-dealer agent and an investment adviser representative of AXA, which is a registered broker-dealer and investment adviser. Schubert was also a licensed insurance agent for an AXA affiliate. *See Petition*, ¶ 6, attached hereto as Exhibit "1." Further, Schubert was a registered broker-dealer agent of Wilbanks Securities, Inc, an Oklahoma corporation and registered broker-dealer. *Id.* at ¶ 7.

2. Schubert and/or Schubert and Associates orchestrated a Ponzi scheme in which Schubert, promising large financial returns to her investors, accepted money from them and represented that their money would be invested in options contracts or used to “day trade.” *See Petition in Case No. CJ-2005-3796 filed 05/11/05*, ¶ 6, attached hereto as Exhibit “2.” However, most of the money given to Schubert by her investors (“Investor Assets”) was not invested in legitimate investments, but was paid to other investors (referred to as “Relief Defendants”) as purported returns on their non-existent investments. *See Ex. “1,”* ¶ 40.

3. As explained for fully below, the Relief Defendants received Investor Assets either as purported returns on a non-existent investment or as gifts, in the nature of homes, vehicles, personal property, and cash for living and/or other living expenses. *Ex. “2,”* ¶ 11. The Relief Defendants received Investor Assets in excess of any funds they transferred to Schubert and/or Schubert and Associates. *Id.*, ¶ 12.

4. On October 14, 2004, ODS filed a civil enforcement action against Schubert and Schubert and Associates in the District Court of Logan County, State of Oklahoma, Case No. CJ-2004-256, based upon alleged violations of Oklahoma’s securities law stemming from Schubert’s Ponzi scheme. *Ex. “1,”* ¶ 12. Pursuant to a court order in that action, the accounting firm of Baird, Kurtz & Dobson, LLP (“BKD”) was authorized to review Schubert’s investor and financial records in order to unravel Schubert’s Ponzi scheme by tracing all Investor Assets and identifying for the court, ODS, and the Receiver: (a) those persons or entities that lost money through their investments in Schubert’s Ponzi scheme (the “Loser Investors”); (b) the total amount of money lost by the Loser Investors; and (c) those persons or entities that gained or profited by Schubert’s Ponzi scheme at the expense of the

Loser Investors, including the amount of their gain. *See Order in Case No. CJ-2004-256 dated 01/14/05*, attached hereto as Exhibit "3."

5. The financial analysis prepared by BKD was based on all bank and other financial records obtained by the Receiver and ODS relative to Schubert's Ponzi scheme. *See Receiver's Report of Financial Analysis in Case No. CJ-2004-256 dated 03/24/05*, attached hereto as Exhibit "4." The analysis prepared by BKD identified all pertinent transactions and determined that of the approximately \$9,061,293.00 lost by the approximately eighty-seven (87) Loser Investors in Schubert's Ponzi scheme, the Relief Defendants received from Schubert and/or Schubert and Associates approximately two-thirds, or \$6,059,024.00, of Investor Assets. *Id.*, ¶ 3; *see also* Ex. "1," ¶ 10. According to ODS, the Relief Defendants were "unjustly enriched" at the expense of and/or to the detriment of the Loser Investors. Ex. "2," ¶ 16.

6. ODS has either settled its claims against the Relief Defendants or has obtained or is currently seeking judgment from the Relief Defendants, and is requiring that the Relief Defendants pay restitution through the disgorgement of any and all of the \$6,059,024.00 in Investor Assets received or held by the Relief Defendants. *Id.*, p. 11. The Defendants in this case were not sued by ODS and/or the Receiver in the case involving the Relief Defendants for the recovery of the \$6,059,024.00 in Investor Assets. *See* Ex. "2."

7. While the Relief Defendants were unjustly enriched at the expense of the Loser Investors for approximately \$6,059,024.00, BKD's financial analysis also found that Schubert was unjustly enriched by the Loser Investors for approximately \$2,817,292.00. Ex. "4," ¶ 4; *see also Excerpt Transcript of Proceedings in Case No. FD-2005-297 dated 02/08/06*, p. 8, lines 11-14, attached hereto as Exhibit "5." Schubert used up those Investor

Assets to pay a variety of expenses and/or bills incurred by Schubert or a business entity controlled by Schubert for such things as groceries, merchandise, utilities, car payments, trips, etc. *Id.*; Ex. "5," p. 27, lines 19-25.

8. Despite the fact that ODS has proof – through the professional financial analysis performed by BKD and filed of record with the court – of the identities of those persons or entities who received Investor Assets and who were unjustly enriched at the expense/detriment of the Loser Investors, ODS seeks an order of restitution in this case against Defendants.³ Ex. "1," p. 60. Specifically ODS requests that the Court order Defendants to compensate the Loser Investors for the damages they suffered from their participation in Schubert's Ponzi scheme. *Id.*

9. It is ODS's stated position that, by filing this civil enforcement action against Defendants and seeking the equitable remedy of restitution, it is seeking to restore the victims of Marsha Schubert's securities fraud to the position they would have been in had the fraud not occurred. *See Plaintiff's Response to Defendants' Motion to Dismiss*, p. 10, attached hereto as Exhibit "6"; *see also Transcript of Proceedings in the instant case dated 08/01/06*, p. 18, lines 6-11, attached hereto as Exhibit "7." However, ODS does not believe that Defendants' unjust enrichment is a prerequisite to the Court ordering restitution. *Id.*; Ex. "7," p. 19, lines 1-3.

10. ODS is not seeking an order of restitution on behalf of the Loser Investors. *See Plaintiffs' Response to Defendants' First Request for Production of Documents and First Set of Interrogatories*, attached hereto as Exhibits "8" and "9"; *see also Letter dated 02/07/08 from Grant Lucky to Amanda Cornmesser*, attached hereto as Exhibit "10." ODS asserts that

³ ODS also requests that the Court order permanent injunctive relief and impose civil penalties against Defendants. However, Defendants move for partial summary judgment only as to ODS's request for an order of restitution.

it has no obligation to retrieve or obtain from the Loser Investors answers and/or documents which may be responsive to Defendants' Discovery Requests to ODS. *Id.* Further, in the event ODS and Defendants resolved ODS's claims against Defendants for restitution to the Loser Investors, ODS cannot provide Defendants with a release that would remise, acquit, and forever discharge Defendants from any and all claims based upon the same demand. Ex. "10."

STANDARD

Rule 13 of the Oklahoma Rules for District Courts governs summary judgments. The main purpose of the procedure is to avoid useless trials while achieving a final determination on the merits. *Union Oil of California v. Board of Equalization of Beckham County*, 1996 OK 40, 913 P.2d 1330. Summary judgment is appropriate if there is no substantial controversy as to any material fact. *Id.*; *Copeland v. Tela Corp.*, 1999 OK 81, 996 P.2d 931, 932. When the evidentiary materials, viewed as a whole, eliminate all factual disputes relative to a question of law, summary judgment is should be granted on that issue. *See Dixon v. Bhuiyan*, 2000 OK 56, 10 P.3d 888, 890; *Manora v. Watts Regulator Co.*, 1989 OK 152, 784 P.2d 1056 (Summary judgment is the appropriate procedural device to reach final judgment where there is no dispute as to any material facts). In this case, partial summary judgment is appropriate in favor of Defendants in light of the fact that, as demonstrated below, there is no genuine issue of material fact relating to Plaintiff's request for restitution and Defendants are entitled to partial judgment as a matter of law on that issue. Alternatively, should the Court find that restitution is an appropriate remedy, Plaintiff is not the real party in interest to pursue such relief.

ARGUMENT AND AUTHORITIES

PROPOSITION I: PARTIAL SUMMARY JUDGMENT SHOULD BE GRANTED TO DEFENDANTS SINCE THE UNDISPUTED FACTS DEMONSTRATE THAT RESTITUTION IS AN INAPPROPRIATE REMEDY.

A. Introduction

The statutory basis for ODS's request for an equitable order of restitution against Defendants lies in certain remedial provisions of the Oklahoma Uniform Securities Act relating to civil enforcement actions brought by ODS. *See* 71 O.S. § 1-603. In pertinent part, § 1-603 provides that:

- A. If the Administrator believes that a person has engaged . . . in an act . . . constituting a violation of this act . . . the Administrator may . . . maintain an action in the district court of Oklahoma County . . . to enjoin the act . . . and to enforce compliance with this act . . .
- B. In an action under this section *and on a proper showing*, the court *may*:
 - 1. Issue a permanent or temporary injunction, restraining order, or declaratory judgment;
 - 2. Order other *appropriate* or ancillary relief, which *may* include:
 - c. . . . an order of . . . *restitution* . . . directed to a person that has engaged in an act . . . constituting a violation of this act or the predecessor act

(Emphasis added.) Readily observable from the plain language of the statute is that the Court has a vast array of *permissive* – not mandatory – remedies that it *may* utilize in a civil enforcement action brought by ODS. Whether to order a particular remedy in the case is governed by two factors: (1) the remedy may be ordered only after “a proper showing” has been made by ODS and only where the remedy is “appropriate”; and (2) the decision to order the remedy lies solely within the court’s discretion, even if a proper showing has been made.

Id.; see also *State ex rel. Cartwright v. Oklahoma Natural Gas Co.*, 1982 OK 11, 640 P.2d 1341, 1345 (noting that, under “general rules of construction,” use of the word “may” rather than “shall” in a statute makes such action permissive and not mandatory). Thus, while ODS may institute an action in district court for the limited purpose of enjoining the particular acts complained of by ODS, the power to impose a remedy (if any) lies solely within the discretion of the district court and, at a minimum, is contingent upon a showing by ODS that the remedy it has chosen to pursue is both appropriate and warranted under the law and the facts of the case.

In this case, ODS has requested that the Court impose a number of what it has termed “equitable” relief measures against Defendants. In addition to their request for injunctive relief, ODS requests that the Court enter an order of restitution, which ODS interprets as an equitable remedy that is based upon and measured by the damages suffered by the Loser Investors through their participation in Schubert’s Ponzi scheme. In other words, ODS requests that the Court order Defendants to compensate the Loser Investors for their monetary losses (damages) and requests that the Court do so through the equitable remedy of restitution.

Such an unusual and unprecedented request, however, fundamentally misconstrues the fixed and long-standing elements of equitable restitution and the conditions under which it is applied, as reflected in a number of authoritative sources including Oklahoma’s common law, the common law of other jurisdictions, the Restatements of Restitution and Contracts, and leading treatises on remedies. Stated differently, ODS’s interpretation of restitution as a method of compensating Loser Investors for their losses (damages) is far removed from its

well-recognized common law meaning and, at bottom, seeks to contort the remedy in a manner unsupported by Oklahoma law.

B. ODS Has Failed to Establish the Elements, Conditions and Incidents of Restitution

1. ODS must clearly establish its right to the equitable remedy of restitution

The right to an equitable remedy, such as restitution, must be clearly established. *State Life Ins. Co. of Indianapolis v. Ussery*, 1937 OK 113, 69 P.2d 43, 47.⁴ “The right to [restitution] depends upon elements, conditions, and incidents, which equity regards as essential to the administration of . . . its . . . mode of relief. When all these elements, conditions, and incidents exist, the remedial right is perfect in equity.” *McCubbins v. Simpson*, 1939 OK 474, 98 P.2d 49, 51; *see also Sparks v. Trosper*, 1939 OK 561, 97 P.2d 81, 83 (“The relief to which a plaintiff is entitled is governed by the particular remedy he can and does choose”). Thus, under Oklahoma law, whether restitution is an appropriate equitable remedy is contingent upon the “elements, conditions, and incidents” of restitution and whether those essential elements and conditions exist and/or have been clearly established by ODS. *See also Day v. Southwest Mineral Energy, Inc.*, 1980 OK 118, 617 P.2d 1334, 1338 (noting that an equitable remedy may only be granted under the Oklahoma Securities Act “where the fact of the case show such relief is appropriate”). The clear answer to that question, under the undisputed facts of this case, is that ODS has not and cannot establish the essential elements of restitution since the Defendants have not been unjustly enriched at the expense of the Loser Investors.

⁴ The United States Supreme Court has similarly noted that restitution is not a matter of right, but a matter of sound equitable discretion. *See Atlantic Coast Line R.R. Co. v. Florida*, 295 U.S. 301, 310, 55 S.Ct. 713, 716-17 (1935). Restitution is “*ex gratia*, resting in the exercise of sound discretion; and the court will not order it where the . . . case does not call for it . . .” *Id*

2. Restitution has a fixed meaning under Oklahoma's common law

Restitution is not a defined term under the Oklahoma Securities Act. However, restitution is a known legal term that has a fixed and well-defined meaning "in the body of Oklahoma's common law." *Lewis v. Sac and Fox Tribe of Oklahoma Housing Authority*, 1994 OK 20, ¶ 30, 896 P.2d 503, 515. Not only does restitution have a definite meaning under the substantive norms of Oklahoma's common law, but the meaning ascribed to it by Oklahoma's jurisprudence derives from and comports with the common law meaning of restitution as reflected in various Restatements of the law⁵ (including the Restatements of Restitution and Contracts) and the great weight of authority from other jurisdictions and leading treatises.

The fact that restitution has a definite meaning at common law – both in Oklahoma's jurisprudence and elsewhere – is critically important to the resolution of whether restitution is an appropriate remedy under the undisputed facts of this case. That is, when the Oklahoma legislature fails to define a term in a statute or indicate a contrary intention, Oklahoma law governing statutory construction *presumes* that the term is used in its "technical common law sense." *Barton v. Hooker*, 1955 OK 78, 283 P.2d 514, 517. "In construing a statute containing words which have a fixed meaning at common law, and the statute nowhere defines such words, they will be given the same meaning they have at common law." *City of Muskogee v. Landry*, 1977 OK 127, 567 P.2d 988, 990 (citation omitted).⁶ Since the

⁵ The Restatements have "long been recognized as *material sources of the common law*." *Bouziden v. Alfalfa Elec. Co-Op., Inc.*, 2000 OK 50, ¶ 8, 16 P.3d 450, 464 (Opala, J. dissenting) (emphasis in original). Restatements "provide lawyers and judges with carefully formulated descriptions of the [common] law and traditionally have served as authoritative guides for both legal briefs and judicial opinions." Shirley Abrahamson, *Refreshing Institutional Memories: Wisconsin and the American Law Institute, The Fairchild Lecture*, 1995 Wis. L. Rev. 1, 3 (1995).

⁶ This established rule of statutory construction has existed for centuries and is not unique to Oklahoma. As far back as 1837, the United States Supreme Court stated that if a legislatively undefined term is known to the

common law remains in force in aid of the statutes, the statutes and the common law can thus be “read together as one harmonious whole.” *Lierly v. Tidewater Petroleum Corporation*, 2006 OK 47, 139 P.2d 897, 905 n.8.

a. Restitution means recovery based upon and measured by a defendant’s unjust enrichment at the expense of plaintiff

Courts in Oklahoma are “bound by Oklahoma’s common law jurisprudence.” *Cranfill v. Aetna Life Ins. Co.*, 2002 OK 26, ¶ 12, 49 P.3d 703, 707. The body of Oklahoma’s common law relating to the meaning of restitution has consistently emphasized and referred to it as an *equitable remedy that is distinct from compensatory damages since it is based upon and measured by a defendant’s unjust enrichment rather than a plaintiff’s loss*. See *Warren v. Century Bankcorporation, Inc.*, 1987 OK 14, 741 P.2d 846; *Stites v. Duit Construction Company, Inc.*, 1995 OK 69, 903 P.2d 293; *Sholer v. State Department of Public Safety*, 1997 OK 89, 945 P.2d 469. For example, in *Stites* the Oklahoma Supreme Court examined the meaning of restitution in the context of 12 O.S. § 774,⁷ which (without defining the term in the statute) specifically authorized restitution as a remedy. Citing to previous Oklahoma cases interpreting the meaning of restitution as well as the Restatement of Restitution, the Court stated that:

Restitution is an equitable remedy that generally will be available 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*. The object of restitution is to put the parties back into the position in which they were before unjust enrichment occurred.

common law, “it must be taken as intended to be applied according to its established definition as a known legal term.” *Briscoe v. Bank of Commonwealth of Kentucky*, 36 U.S. 257 (U.S.Ky. Jan Term 1837); see also *McCool v. Smith*, 66 U.S. 459 (1861) (“It is a sound rule, that whenever a Legislature in this country uses a term without defining it, which is well known in English law, it must be understood in the sense of the English law.”)

⁷ 12 O.S. § 774 provides that: “If any judgment or judgments, in satisfaction of which any lands or tenements are sold, shall at any time thereafter be reversed, such reversal shall not defeat or affect the title of the purchaser or purchasers; but in such cases, *restitution shall be made*, by the judgment creditors, of the money, for which such lands or tenements were sold, with lawful interest from the day of the sale.” (Emphasis added.)

Id. at 301 n.28 (citation and internal quotes omitted) (emphasis in original); *see also Sholer*, 945 P.2d at 479 (“[R]estitutionary remedies *are designed to guard against unjust enrichment*”) (emphasis in original). Unjust enrichment occurs whenever a party, by expenditure or otherwise, adds to the property of another or saves the other from expense or loss. *McBride v. Bridges*, 1950 OK 25, ¶ 8, 215 P.2d 830 (citation omitted). “One is not unjustly enriched, however, by retaining benefits involuntarily acquired which law and equity give him absolutely without any obligation on his part to make restitution.” *Id.*

Thus, the simplest account of Oklahoma’s common law description of restitution refers to it as a remedy that is based upon and measured by the unjust enrichment of the defendant at the expense of the plaintiff. 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. Therefore, any definition or application of restitution that is detached from the prevention of unjust enrichment is contrary to and divorced from its defined meaning under Oklahoma’s common law.

To further buttress this point, the Oklahoma Supreme Court’s most detailed exposition of the meaning of restitution occurred in *Warren*, 741 P.2d at 846. In *Warren*, the minority shareholders of a bank brought a shareholder’s derivative action against the bank’s controlling parent company (“Century”), alleging *inter alia* that Century, through its operation of another wholly owned subsidiary bank, was unfairly competing with the bank for loans. The remedy sought by the minority shareholders was restitution. In affirming the trial court’s monetary award to the minority shareholders of gross rather than net income, the Supreme Court provided a detailed discussion of the meaning Oklahoma’s common law assigns to restitution. The Court held that:

The unifying theme of various restitutionary tools is the prevention of unjust enrichment . . . It starts with the general principle that restitution will be available whenever one has received a benefit to which another is justly entitled. The inequity of retaining a benefit can spring from a variety of sources, such as fraud or other unconscionable conduct in which the recipient has received a benefit for which he has not responded with a quid pro quo. The remedy in restitution rests on the ancient principles of disgorgement. Beneath the cloak of restitution lies the dagger that compels the conscious wrongdoer to 'disgorge' his gains. Disgorgement is designed to deprive the wrongdoer of *all gains flowing from the wrong rather than to compensate the victim of the fraud.*

Id. at 853 (emphasis in original) (citing Restatement, Restitution, § 1 (1937); Douthwaite, *Attorney's Guide to Restitution*, § 8.1, p. 324 (1977); Dobbs, *Handbook on the Law of Remedies*, § 12.1, Ch. 12, p. 792 (1973)). Warren's detailed description of restitution simply leaves no room to question that settled Oklahoma law recognizes two essential elements and conditions of restitution: (1) to prevent unjust enrichment of one party at the expense of another; and (2) recovery is measured by the defendant's unjust enrichment, not by the plaintiff's loss. Put simply, restitution means recovery based upon and measured by defendant's unjust enrichment.

b. Oklahoma's common law principles governing restitution comports with the common law

Oklahoma's common law principles governing restitution is derived from and consistent with the meaning accorded it by the common law. The term common law "refers not only to the ancient unwritten law of England, but also to that body of law created and preserved by decisions of courts." *McCormack v. Oklahoma Publishing Company*, 1980 OK 98, 613 P.2d 737, 740; *see also In re Estate of Bleeker*, 2007 OK 68, ¶ 13, 168 P.3d 774, 781 ("The common law, which stands legislatively declared to be a constituent part of this State's body of law, need not be drawn exclusively from English precedent, but may also be fashioned by utilizing other sources, including legal norms taken from common-law

jurisprudence of sister states”) (emphasis in original omitted). As stated below, the Restatements of Restitution and Contracts and the law of other states all view restitution in terms of a remedy based upon and measured by unjust enrichment.

i. The Restatement’s view of restitution

One of the best resources for examining a given subject’s common law meaning is the Restatements published by the American Law Institute. “Restatements of the common law on chosen subjects, which are produced by the American Law Institute, a private organization of judges, practitioners, and law teachers, are scholarly *codifications of American common law in various substantive law areas, based upon the decisions of the courts of last resort of the states.*” *Qualls v. United States Elevator Corp.*, 1993 OK 135, 863 P.2d 457, 463 (citation and internal quotes omitted) (emphasis in original).

In that regard, the Restatement of Restitution provides a cohesive statement of the common law principles and rules governing the application of restitution. According to the Restatement, the bedrock principle by which a person is entitled to restitution is contained in § 1, where it is stated that, “A person who has been unjustly enriched at the expense of another is required to make restitution to the other.” In both *Stites* and *Warren, supra*, the Oklahoma Supreme Court cited this section of the Restatement as the quintessential meaning of restitution.

As noted by the authors of the Restatement, the concept of restitution as a remedy based upon and measured by unjust enrichment was at the heart of the earliest bills in England’s chancery courts for restitution. These “bills for restitution” were conceived of as restoring to the plaintiff the benefit(s) conferred upon the defendant and included “bills for the recovery of property obtained by fraud, for the return of the consideration paid for an

unperformed promise, for the recovery of a chattel from the bailee after the death of the bailor, and, of most importance, for the recovery of land which had been granted with a promise of its return.” *Restatement of Restitution* part I, introductory note (1937) (tracing the roots of restitution in equity and common law). In each instance, restitution was authorized in order to prevent unjust enrichment by returning to the plaintiff the thing given or the benefit received. *See* § 1; *Warren*, 741 P.2d at 852 (“Beneath the cloak of restitution lies the dagger that compels the conscious wrongdoer to ‘disgorge’ his gains . . . [and] to cough up what he got, neither more nor less”).

Further, in addition to the Restatement of Restitution, the Restatement (Second) of Contracts, § 370 permits restitution as a remedy in contract cases and, taking its cue from the Restatement of Restitution, similarly measures recovery based upon the defendant’s unjust enrichment. It states generally that “[a] party is entitled to restitution under the rules stated in this Restatement only to the extent that he has conferred a benefit on the other party by way of part performance or reliance.” Comment (a) to § 370 provides that “[a] party’s restitution interest is his interest in having restored to him any benefit that he has conferred on the other party.” Accordingly, a party’s restitutionary remedy is “available to a party only to the extent that he has conferred a benefit on the other party.” *Id.* Thus, if the Restatements are indeed, as described by the Oklahoma Supreme Court, “scholarly codifications of American common law,” *Qualls*, 863 P.2d at 463, then Oklahoma’s definition of restitution is in keeping with the legal norms of other states.⁸ As will be shown below, such is the case.

⁸ Not only do the Restatements of Restitution and Contracts support Oklahoma’s description of restitution as a remedy based upon and measured by unjust enrichment, but leading and authoritative treatises covering remedies describe it in a similar – if not identical – fashion. Moreover, these treatises draw important distinctions (as previously noted by the Oklahoma Supreme Court in *Warren*) between a restitution remedy and a damages remedy.

ii. Other states' view on restitution

The definite meaning ascribed to restitution by Oklahoma's common law, the Restatements, and modern treatises on remedies is also shared by other states. *See generally Waldrop v. Southern Company Services, Inc.*, 24 F.3d 152, 158 (11th Cir. 1994) ("Restitution is generally defined as an equitable remedy designed to cure unjust enrichment of the defendant absent consideration of the plaintiff's losses"); *Opelika Production Credit Association, Inc. v. Lamb*, 361 So.2d 95, 99 (Ala. 1978) ("Where the plaintiff has suffered a detriment, and the defendant has received a benefit as a result, it is said that justice demands the repayment by the defendant of the plaintiff's loss. The measure of the defendant's liability is, however, limited to the value of the benefit received, whether or not it is equal to, less than, or greater than the plaintiff's loss. But, in any case, there must be a detriment, and

For example, a restitution recovery and a damages recovery are based on entirely different theories. *See* D. Dobbs, *Law of Remedies*, § 4.1, at 224 (1973). "[T]he main purpose of the damages award is some rough kind of compensation for the plaintiff's loss. This is not the case with every kind of money award, only with the damages award." *Id.* § 3.1 at 136. In this respect, restitution stands in direct contrast to the damages action. *Id.* § 4.1 at 224. "The restitution claim . . . is not aimed at compensating the plaintiff, but at forcing the defendant to disgorge the benefits that it would be unjust for him to keep." *Id.* The principle of restitution "is to deprive the defendant of benefits that in equity and good conscience he ought not to keep . . ." *Id.*; *see also* George Palmer, *The Law of Restitution*, § 1.1, at 5 (1978) (stating that, with respect to restitution, "attention is centered on the prevention of injustice . . . [n]ot all injustice but rather one special variety: the unjust enrichment of one person at the expense of another"); *Warren*, 741 P.2d at 852 (noting that a remedy in restitution is aimed at "depriving the wrongdoer of all gains flowing from the wrong rather than to compensate the victim of the fraud").

Finally, Professor Corbin contrasts the contractual remedy of restitution with that of damages where he states that:

The remedy of restitution differs from the remedy in damages in that in awarding damages the purpose is to put the injured party in as good a position as he would have occupied, had the contract been fully performed, while in enforcing restitution, the purpose is to require the wrongdoer to restore what he has received and thus tend to put the injured party in as good a position as that occupied by him before the contract was made. Ordinarily, restitution requires that the defendant shall give something back to the plaintiff; and it may be supposed that the defendant cannot do this unless he has received something of value at the plaintiff's hands.

5 Corbin on Contracts, § 1107, at 573 (1964). Consequently, from these authoritative sources on the remedy of restitution, one cannot question the notion that restitution and damages are two different theories of recovery, with restitution's focus centered on a defendant's unjust enrichment rather than a plaintiff's loss.

a resulting benefit, and the two must be related”); *Rollings v. Smith*, 716 N.E.2d 502, 507 (Ind. App. 1999) (“As distinct from damages, restitution is an award made to remedy defendant’s unjust enrichment rather than plaintiff’s loss. Stated differently, restitution measures the remedy by the defendant’s gain and seeks to force disgorgement of that gain”); *National City Bank v. Stang*, 618 N.E.2d 241, 243 (Ohio App. 1992) (“One of the basic principles applicable to [restitution] is that a defendant is liable only to the extent of the enrichment”); *Montoya v. Grease Monkey Holding Corporation*, 883 P.2d 486, 489 (Colo. App. 1994) (“Restitution is a measure of damages which restores a party to his/her prior status. It is available as a remedy when the injured party is due reimbursement for a benefit conferred upon another”). Put simply, there are innumerable cases from the common law of other jurisdictions defining restitution similar to Oklahoma’s jurisprudence – that is, restitution means recovery based upon and measured by unjust enrichment, not plaintiff’s loss.

A few additional cases warrant more detailed analysis since, in these cases, the courts rejected the application of restitution as a remedy under similar circumstances to the facts of this case, *i.e.*, (1) where there was no allegation or evidence of unjust enrichment on the part of defendants, only losses/damages suffered by the plaintiffs; or (2) where plaintiff was seeking restitution and measuring damages based upon his loss rather than defendant’s gain.

For instance, the case most analogous to the facts of this case is a decision from Maryland’s highest court interpreting the word “restitution” as used in Maryland’s Consumer Protection Act (the “Consumer Protection Act”). See *Luskin’s Inc. v. Consumer Protection Division*, 726 A.2d 702 (Md. 1999). The *Luskin’s* case involved an enforcement action brought against a retailer of electric and household goods by a governmental agency, the

Consumer Protection Division (“Agency”), charged by statute with enforcing the Consumer Protection Act. The Agency alleged that the retailer (Luskin’s) “advertised and conducted a conditional gift promotional program which the Agency found to be deceptive.” *Id.* at 704. Based upon Luskin’s deceptive acts, the Agency ordered that Luskin’s pay damages to the consumer in amount equal to the retail value of airline tickets that Luskin’s advertised as “free and by not disclosing the material costs, terms and conditions” *Id.* at 726.

Since the Agency was only authorized by statute to seek restitution from those who violated the Consumer Protection Act, one of the central issues was whether the Agency’s restitution order exceeded its powers. *Id.* at 707. The Court vacated the Agency’s monetary award against Luskin’s and held that restitution, as used in the Consumer Protection Act, has a common law meaning that is distinct from compensatory damages and is based upon and measured by a defendant’s unjust enrichment. *Id.* at 726. The Court stated that:

The damages recovery is to compensate the plaintiff and it pays him, theoretically, his losses. The restitution claim, on the other hand, is not aimed at compensating the plaintiff but at forcing the defendant to disgorge benefits it would be unjust for him to keep . . . [Therefore,] [t]he justification [for a restitutionary recovery] lies in the avoidance of unjust enrichment on the part of the defendant.

Id. (citation and internal quotes omitted). Accordingly, since the Agency’s order was “not rooted in restitution . . . [nor] limited to preventing unjust enrichment,” the Court vacated the monetary relief ordered by the Agency and remanded the case for calculation “focused on unjust enrichment.” *Id.*; accord *Magan v. Medical Mutual Liability Insurance Society of Maryland*, 629 A.2d 626 (Md. 1993) (holding that restitution within meaning of statute authorizing Insurance Commissioner to impose restitution on insurer who violates insurance code is used in the common law sense of a remedy based upon and measured by unjust enrichment).

Similarly, in *Rapaport v. United States Department of Treasury, Office of Thrift Supervision*, 59 F.3d 212 (D.C. Cir. 1995) – a decision authored by United States Supreme Court Justice Ruth Bader Ginsburg while she was on the Court of Appeals for the District of Columbia – the Office of Thrift Supervision (as successor to the Federal Savings and Loan Insurance Corporation) ordered Rapaport, who was the majority shareholder of a savings and loan that failed, to pay approximately \$1.5 million pursuant to a personal guarantee to “maintain the capital in the institution at no less than the minimum required by regulation.” *Id.* at 213. The personal guaranty was executed as a condition to receiving deposit insurance from the FSLIC. When the savings and loan failed, OTS sued Rapaport for his failure to honor the terms of his guaranty relating to maintaining the financial institutions net worth. OTS sought restitution from Rapaport for the \$1.5 million loss.

However, Judge Ginsburg held that restitution was an improper remedy since OTS was not seeking to recover the amount of defendant’s gain, but was seeking an amount equal to OTS’s alleged loss. Judge Ginsburg stated succinctly that:

The \$1.5 million Rapaport was allegedly required to contribute may arguably approximate the amount of the agency’s loss attributable to Rapaport’s alleged breach, but *no principle in the law of restitution is more clear than this: Restitution is measured by the defendant’s unjust enrichment, not by the plaintiff’s loss.*

Id. at 218 (emphasis added) (citation and internal quotes omitted). Accordingly, the Court rejected OTS’s request for restitution since their claim for damages based upon their loss rather than defendant’s gain failed to square “with any recognizable notion” of restitution. *Id.*; see also *Guyana Telephone & Telegraph Co. v. Melbourne International Communications, Ltd.*, 329 F.3d 1241 (11th Cir. 2003) (holding that district court erred when it permitted jury to measure plaintiff’s right to restitution in terms of plaintiff’s loss rather

than the benefit conferred on the defendants since “[r]estitution measures a plaintiff’s recovery according to the defendant’s, rather than the plaintiff’s, rightful position”).

3. The undisputed facts of this case demonstrate that restitution is an inappropriate remedy since there is no evidence that the Loser Investors’ losses unjustly enriched Defendants

By invoking the equitable jurisdiction of this Court and seeking a restitutionary remedy against Defendants, ODS must live by the rules governing the application of restitution as an equitable remedy. Restitution is “not a proper remedy merely because it might appear expedient or generally fair that some recompense be afforded for an unfortunate loss to the claimant” *Pazarin v. Armes*, 512 F.Supp.2d 861, 876 (W.D. Texas 2007) (quoting *Heldenfels Bros., Inc. v. Corpus Christi*, 832 S.W.2d 39, 42 (Tex. 1992)). As previously demonstrated by the overwhelming weight of authority, restitution means recovery based upon and measured by a defendant’s unjust enrichment, not a plaintiff’s loss. “Because restitution is founded on the concept of unjust enrichment, a court considering a request for restitution must investigate the extent to which the target ‘received a benefit.’” *Texaco Puerto Rico, Inc. v. Department of Consumer Affairs*, 60 F.3d 867, 875 (1st Cir. 1995) (quoting Restatement of Restitution, § 1, cmt. a (1937)). Thus, the person requesting restitution – here ODS – “bears the burden of proving the conferral and extent of a benefit.” *Id.* at 877 (citing *Atlantic Coast Line R. Co.*, 295 U.S. at 309, 55 S.Ct. at 716).

ODS has failed to allege – nor is there any evidence – that Defendants were conferred a benefit by the Loser Investors. The allegations in ODS’s Petition simply do not recite any transactions between Defendants and the Loser Investors, nor does the Petition allege that Defendants were unjustly enriched at the expense of the Loser Investors. *See Johnson v. Microsoft Corporation*, 834 N.E.2d 791, 799 (Ohio 2005) (upholding the dismissal of a

complaint seeking restitution where the complaint failed to recite the conferral of any benefit on defendant and failed to recite any economic transaction between plaintiff and defendant). The reason ODS cannot allege or prove Defendants' unjust enrichment is simple: the financial analysis of Schubert's Ponzi scheme performed by BKD traced all transactions relevant to her scheme and established that the Relief Defendants and Schubert were the beneficiaries of the Investor Assets in the approximate amount of \$9,000,000.00. *See* Statement of Undisputed Facts Nos. 5 and 7.

For instance, in ODS's lawsuit against the Relief Defendants, ODS alleged that the Relief Defendants "received cash and other property and/or control property that are the proceeds of the unlawful activities of Marsha Schubert and/or Schubert and Associates (collectively, Investor Assets)." ODS asserted that the relief defendants "received Investor Assets as part of and in furtherance of [Marsha Schubert's] securities violations [and have been] unjustly enriched." *See* Exhibit "2," ¶¶ 14, 16. Accordingly, ODS requested that the Court disgorge the "substantial amount of Investor Assets: over \$6,000,000 of the \$9,000,000 lost in this Ponzi scheme" received or held by the Relief Defendants. *Id.* at p. 11.

ODS also requested a "judgment against the Relief Defendants for an amount equal to all assets received by them that were generated from Investor Assets and for which the Relief Defendants gave no consideration or to which Relief Defendants have no legitimate claim" *Id.* Moreover, Schubert used up the remaining Investor Assets to pay a variety of expenses and/or bills incurred by Schubert or a business entity controlled by Schubert for such things as groceries, merchandise, utilities, car payments, trips, *etc.* Thus, ODS is well aware of the universe of those persons or entities who were unjustly enriched at the expense of the Loser Investors and that universe does not include Defendants.

CONCLUSION

Based upon the foregoing, it is abundantly clear that the legal term restitution has a well-defined meaning in the body of Oklahoma's common law as well as the common law of other jurisdictions. Oklahoma law describes restitution as an equitable remedy based upon and measured by a defendant's unjust enrichment. That precise meaning has been imported into the Oklahoma Uniform Securities Act by operation of law. The meaning Oklahoma's jurisprudence ascribes to restitution also comports with leading and authoritative treatises governing the application of restitution. Despite this overwhelming authority to the contrary, ODS does not believe that unjust enrichment forms any part of the equitable remedy of restitution and, for that reason, has made no allegation of Defendants' unjust enrichment in its Petition and requests that the Court order Defendants to pay the Loser Investors' losses without evidence that those losses unjustly enriched Defendants. However, no principle of restitution is more clear than this: Restitution is measured by the defendant's unjust enrichment, not the plaintiff's loss. ODS's request does not comport with the law on restitution and, therefore, Defendants respectfully request that the Court grant Defendants' Motion for Partial Summary Judgment on that issue.

PROPOSITION II: ALTERNATIVELY, TO THE EXTENT THAT THE COURT FINDS THAT RESTITUTION IS AN APPROPRIATE REMEDY, ODS IS NOT THE REAL PARTY IN INTEREST TO PURSUE SUCH RELIEF ON BEHALF OF THE LOSER INVESTORS.

A. Factual Background

In this case, the Court has previously ruled that the legal basis for ODS'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 those statutes, a person commits a violation of Oklahoma's securities laws if he or she materially aids and/or participates in a fraudulent sales transaction between a seller and a purchaser of securities.⁹ Based upon these alleged violations of Oklahoma law, ODS requested in its petition that Defendants make victim-specific relief, *i.e.*, restitution "for the benefit of all participants in the Purported Investment Program who transferred money to Marsha Schubert for the purpose of making securities investments on their behalf and who suffered damages from their participation in the Purported Investment Program." *Petition*, p. 60. Thus, in filing suit and seeking victim-specific relief in the form of damages to the Loser Investors, it was initially believed by Defendants that ODS was attempting to recover damages on behalf of and/or for the benefit of a certain class of private individuals (the Loser Investors) who entered into sales transactions with Schubert and suffered damages based upon her allegedly fraudulent statements.

In order to defend ODS's claims and request for damages, Defendants served ODS with discovery requests that were aimed, in part, upon discovering such information as: (1)

⁹ 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, ODS must establish that Schubert made fraudulent statements to the Loser Investors during the sales transaction and that Defendants were material participants or aided in the sale of securities by Schubert.

how Defendants in any way materially participated and/or aided in Schubert's sales transactions with the Loser Investors; and (2) how the Loser Investors were damaged in any way by Defendants. Such basic information requested by Defendants goes to the very heart of ODS's claims against Defendants and is certainly discoverable under Oklahoma's Discovery Code. In response, however, ODS objected to producing this relevant information. First, 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." *See* Statement of Undisputed Fact No. 10. Second, ODS claimed that the information was not requested from the Loser Investors and that the Loser Investors were not within the control of ODS. Thus, not only does ODS assert that it does not have this information in 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.

Additionally, after ODS filed the case, the parties began discussing the possibility of conducting mediation in hopes of resolving the case and potentially avoiding any unnecessary litigation expenses in the event a settlement could be reached. To that end, the parties retained the services of a mediator, Steven L. Barghols. However, no mediation was ever conducted once Defendants discovered that such efforts would be futile due to ODS's position that even if the parties reached a settlement as to ODS's request for damages to the Loser Investors, it could not provide Defendants with a release that would forever discharge Defendants from any and all claims by Loser Investors arising out of the same acts. In other words, ODS could not provide a release that would assure Defendants that they would not be

subject to multiple and vexatious lawsuits based upon the same claims as those asserted by ODS.

Fortunately for Defendants, Oklahoma law does not permit such unprecedented action by ODS. As will be shown below, the public policy concerns inherent in Oklahoma's substantive and procedural rules relating to the avoidance of multiple and vexatious lawsuits, which have been recognized and applied by Oklahoma courts through the rule requiring actions to be prosecuted by the real party in interest, far outweighs the right of ODS to pursue a particular remedy against Defendants.

B. ODS Is Not The Real Party In Interest With Respect To Its Request For Restitution

1. Legal standard

Every cause of action must be prosecuted in the name of the real party in interest. 12 O.S. § 2017(A). The "real party in interest" is the party legally entitled to the proceeds of a claim in litigation. *Aetna Casualty & Surety Co. v. Associates Transports, Inc.*, 1973 OK 62, 512 P.2d 137, 140. The real party in interest rule is designed to protect the defendant by ensuring that the party with the legal right to sue brings the action. *Mainord v. Sharp*, 1977 OK CIV APP 29, 569 P.2d 546, 548. Only in this manner is the defendant assured that he will not be subjected later to a second suit for the same cause. *Meadors v. Majors*, 1994 OK CIV APP 53, 875 P.2d 1166.

In *Oklahoma Wildlife Federation, Inc. v. Nigh*, 1972 OK 144, 513 P.2d 310, 314, the Oklahoma Supreme Court articulated the rationale underlying the real party in interest requirement as follows:

A defendant's right is to have a cause of action prosecuted against him by the real party in interest, but his concern ends when a judgment for or against the nominal plaintiff would protect him from any action upon the same demand

by another, and when, as against the nominal plaintiff, he may assert all defenses and counterclaims available to him, were the claim prosecuted by the real owner.

See also Black Hawk Oil Co. v. Exxon Corp., 1998 OK 70, ¶ 24, 969 P.2d 337, 344. Thus, based upon the foregoing description, a defendant is deprived of his or her right to have a suit prosecuted against him by the real party in interest when: (1) a judgment and/or resolution of the case would not protect the defendant from any action arising out of the same acts, and (2) a defendant is prevented from asserting all defenses available to him, were the claim brought by the real owner. Under the undisputed facts of this case, it is readily observable that ODS's request for restitution is not being prosecuted by the real party in interest.

2. ODS has disavowed that it is seeking restitution for the Loser Investors

Even if ODS could establish that Defendants materially participated in a fraudulent sales transaction between Schubert and each Loser Investor, ODS is not legally entitled to the proceeds of such a claim. When a plaintiff seeks the recovery or return of funds to which it is not entitled, then the plaintiff is not the real party in interest. *Oklahoma Quarter Horse Racing Association v. Remington Park, Inc.*, 1999 OK CIV APP 75, ¶ 6, 987 P.2d 1216, 1218. In this case, ODS has not suffered any detriment as a result of Defendants' alleged conduct and cannot, therefore, be entitled to compensation for damages. *See Fenton v. Sinclair Refining Company*, 1955 OK 45, 283 P.2d 799, 804 (noting that the real party in interest is the person "who would suffer the detriment and be entitled to be compensated therefore"). While 12 O.S. § 2017(A) permits a "party authorized by statute [to] sue in his own name without joining . . . the party for whose benefit the action is brought" and ODS originally claimed that it was seeking an order of restitution for the benefit of the Loser Investors, it has now disavowed and disclaimed such a position in its discovery responses.

Consequently, ODS is not the real party in interest with respect to its request that Defendants pay the Loser Investors damages for their investments with Schubert.

3. Defendants are entitled to protection from multiple lawsuits

Even if ODS had not disavowed its previous position that it was seeking an order of restitution on behalf of the Loser Investors, real party in interest concerns still prohibit ODS from pursuing a restitutionary remedy. That is, as previously stated, the Oklahoma Supreme Court has recognized that a defendant “has a right to be proceeded against in a single action by any injured party for his single wrong . . . and that he is not to be subjected to defense of multiple actions arising out of his single wrong . . . upon separate or separable items of damage arising from that single wrong . . . for which he has but a single liability.” *Lowder v. Oklahoma Farm Bureau Mutual Ins. Co.*, 1967 OK 245, ¶ 18, 436 P.2d 654. For this reason, if resolution of the case would not protect the defendant from further damages claims to others arising out of the same acts, the real party in interest doctrine steps in to protect defendant. Such is the case here.

ODS has advised the Defendants that, in the event a settlement is reached with respect to ODS’s claim for restitution to the Loser Investors, ODS cannot provide Defendants with a release that would forever discharge Defendants (in consideration of payment) from liability to the Loser Investors arising out of the same acts. Based upon this outlandish position, any Loser Investor would be entitled to sue Defendants for damages based upon Defendants’ alleged material participation in Schubert’s fraudulent sales transaction with them, regardless of the resolution of the instant lawsuit and ODS’s plea for damages to the Loser Investors. Defendants could therefore be subjected to nearly 100 lawsuits from Loser

Investors based upon the exact same allegations as those made by ODS here.¹⁰ Public policy concerns inherent in the real party in interest doctrine protect defendants from the specter of multiple lawsuits and overrides the right of ODS to pursue its alleged claims for damages to the Loser Investors. Consequently, ODS is not the real party in interest to pursue a claim of restitution.

4. ODS is depriving Defendants of their right to discovery and their right to assert defenses to ODS's action

Finally, the real party in interest doctrine provides that, if a defendant is denied from asserting defenses to a claim brought by a plaintiff on behalf of another person, then a defendant is deprived of his right to have an action prosecuted against him by the real party in interest. *See Oklahoma Wildlife Federation, Inc.*, 513 P.2d at 314. Here, to the extent that ODS is seeking damages on behalf of the Loser Investors, ODS has deprived Defendants from asserting defenses to its claims by asserting that it has no obligation to retrieve or obtain from the Loser Investors answers and/or documents that are relevant to this case. On the one hand, ODS is requesting that Defendants pay investors who lost money in a scheme that Defendants had nothing to do with and, on the other hand, ODS asserts that Defendants have no right to discovery through ODS in order to demonstrate how these investors were or were not damaged by any actions of the Defendants. ODS's strange view, if taken to its logical conclusion, leaves ODS with no burden of proof relative to its claims and also deprives Defendants of asserting defenses they would be otherwise be entitled to assert if the action

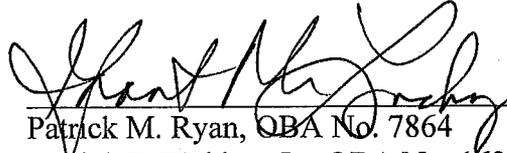
¹⁰ In addition to real party in interest concerns, Oklahoma law also prohibits splitting a single cause of action into multiple lawsuits where separate items of damages arising from a single wrong are litigated. "Oklahoma law has consistently recognized that a single tort or wrong to a single person gives rise to but a single action however numerous the items of damages resulting from the single wrong or tort may be." *Muskogee Title Company v. First National Bank & Trust Company of Muskogee*, 1995 OK CIV APP 29, 894 P.2d 1148, 1150.

was brought by the individual investors. Consequently, ODS is not the real party in interest and Defendants are entitled to partial summary judgment in that regard.

CONCLUSION

Based upon the foregoing, Defendants respectfully request that the Court grant Defendants' Motion for Partial Summary Judgment, and award Defendants such other relief they may be entitled to or which this Court finds just and equitable.

Respectfully submitted,



Patrick M. Ryan, OBA No. 7864
Daniel G. Webber, Jr., OBA No. 16332
Matthew C. Kane, OBA No. 19502
Grant M. Lucky, OBA No. 17398
RYAN WHALEY COLDIRON SHANDY PC
900 Robinson Renaissance
119 North Robinson
Oklahoma City, Oklahoma 73102
Telephone: (405) 239-6040
Facsimile: (405) 239-6766

***ATTORNEYS FOR DEFENDANTS
FARMERS & MERCHANTS BANK,
FARMERS & MERCHANTS BANCSHARES,
INC., JOHN V. ANDERSON and JOHN TOM
ANDERSON***

CERTIFICATE OF SERVICE

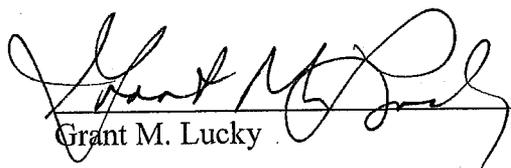
I hereby certify that on this 20th day of May 2008, a true and correct copy of the above and foregoing instrument was mailed, via U.S. Mail, first-class, postage prepaid, to the following attorneys of record:

Melanie Hall
Amanda Cornmesser
Gerri Stuckey
Oklahoma Department of Securities
120 North Robinson Avenue, Suite 860
Oklahoma City, OK 73102

Ann L. Hoover
5611 S.W. Barrington Ct. S., Suite 100
Topeka, KS 66614-2489

Joseph H. Bocoek
Spencer F. Smith.
McAfee & Taft
A Professional Corporation
Tenth Floor, Two Leadership Square
211 N. Robinson Avenue
Oklahoma City, OK 73102-7102

Kurtis J. Ward
Law Offices of Kurtis J. Ward
East Wharf Plaza
9225 Lake Hefner Pkwy., Suite 101
Oklahoma City, OK 73120


Grant M. Lucky