

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

APR 13 2009

PATRICIA PRESLEY, COURT CLERK
by _____
DEPUTY

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

Case No. CJ-2006-3311

PLAINTIFF'S MEMORANDUM OF LAW
ASSERTING DEFENDANTS ARE NOT ENTITLED TO A JURY TRIAL

The Plaintiff, Oklahoma Department of Securities (Department), asserts that its case against Defendants should be resolved by a non-jury trial. The Court requested that all parties file a brief stating their positions.

ARGUMENTS AND AUTHORITIES

It is the established rule under Oklahoma law "in an equity cause a party is not entitled, as a matter of right, to a trial by jury." *Steinway v. Griffith Consolidated Theatres, Inc.*, 1954 OK 156, 273 P.2d 872, 878. The *Steinway* court held that the rule is not in conflict with the Oklahoma statutes¹ and the right to a jury trial under the Oklahoma Constitution. *Id.*

¹ Pursuant to 12 O.S. 556, an issue of fact for the recovery of money shall be tried by a jury. However, the Oklahoma Supreme Court has held that the statute is not applicable in equitable remedy cases.

To determine a party's right to a jury trial, the court should consider the character of the action and the issues framed by the pleadings. *Cheatham v. Bynum*, 568 P.2d 649, 650 (Okla. App. 1977). On April 21, 2006, the Administrator filed this suit alleging the Defendants and their agents materially aided Marsha Schubert's fraudulent conduct. Marsha Schubert was ordered to pay restitution, in connection with a securities fraud, to defrauded investors. *Oklahoma Department of Securities ex rel. Irving L. Faught, Administrator v. Marsha Schubert, et al.*, CJ 2004-256, *United States of America v. Marsha Kay Schubert*, CR 05-078, *State of Oklahoma v. Marsha Kay Schubert*, No. CF-2004-391. If Defendants are found to have aided the fraud, they are jointly and severally liable, along with Marsha Schubert, for the full amount of restitution. The Department is seeking an injunction, restitution and civil penalties against the Defendants.

The parties agree that injunctive relief is equitable. See *Oklahoma Oil & Gas Exploration Drilling Program 1983-A v. W.M.A. Corporation* at 612 (injunctive relief is an equitable issue); *State ex rel. Day*, 1980 OK 118, 617 P.2d 1334, 1339 (the Oklahoma Securities Act authorizes the Administrator to seek injunctive relief, an "equitable remedy"). Conversely, Defendants argue that restitution and civil penalties are legal matters and triable to a jury.

I. The Defendants are not entitled to a jury trial based on the Department's cause of action.

The Department has alleged that Defendants materially aided Marsha Schubert's fraudulent scheme. Fraud cases brought by the SEC, in its enforcement capacity to protect the public interest, are considered equitable in nature. *SEC v. Petrofunds, Inc.* 420 F.Supp. 958, 960 (S.D.N.Y. 1976). The Supreme Court of Oklahoma has endorsed

the use of federal securities cases to interpret this state's uniform securities laws. *Day* at 1339.

Although the Oklahoma courts have not considered whether securities enforcement actions are equitable in nature, the Supreme Court has determined that where a plaintiff states a cause of action where no wrong has affected him directly, it can be an equitable matter. See *Steinway* at 878-879. In *Steinway*, minority stockholders of a corporation brought an action to recover a money judgment for the benefit of the corporation. *Steinway* at 872. The court opined that the constitutional guarantee of a right to a jury trial has no reference to a trial of issues of fact in equity cases. *Id.* at 878. The cause of action brought by the shareholders was an equitable matter even though it may have been a legal matter if brought by the corporation. *Id.* The court held that their shareholder suit was recognizable only in equity and the plaintiffs were therefore, not entitled to a jury trial. See also *Neff v. Barber*, 165 Wis. 503, 162 N.W. 667 (1917) (a recovery of money judgment on behalf of the corporation for damages resulting from a conspiracy of the corporation's managing officers, was a suit in equity to which the right to trial by jury did not extend).

II. The Defendants are not entitled to a jury trial based on the Department's claim for restitution.

Restitution is an equitable remedy. "Restitution' is an ambiguous term, sometimes referring to the disgorging of something which has been taken and at times referring to compensation for injury done." *Black's Law Dictionary* (8th ed. 2004). The latter meaning was referenced by the Oklahoma Supreme Court in *State ex rel. Oklahoma Bar Assn. v. Leigh*, 1996 OK 37, 914 P.2d 661:

Black's Law Dictionary defines the term 'restitution' as an 'equitable' remedy under which a person is restored to his or her original position prior to loss or injury, or placed in the position he or she would have been, had the breach not occurred. Act of restoring; restoration; restoration of anything to its rightful owner; the act of making good or giving equivalent for any loss, damage or injury; and indemnification. (Citation omitted.) Act of making good or giving an equivalent for or restoring something to the rightful owner. (Citation omitted.)

Id. at 668, n. 23. In bringing this case, the Administrator 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.

In *SEC v. Associated Minerals, Inc.*, 75 F.R.D. 724, 725 (1977), the United States Securities and Exchange Commission (SEC) brought an action against a corporation and its two principal officers for participating in an fraudulent oil and gas scheme. The corporation requested a jury trial but the court denied the request. *Id.* The court ruled that it is difficult to determine whether fraud is classified as solely legal or equitable, more emphasis will be put on the remedy sought to resolve whether to grant a jury trial. *Id.* The court ruled that both rescission and recoupment were equitable remedies and the Defendants were not entitled to a jury trial even though the recovery of monies was involved. *Id.* at 726.

In *SEC v. Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, 94-95 (1978), the court granted an injunction and disgorgement and determined that defendants did not have a right to a jury trial. Appellants appealed their right to a jury trial and argued money is money whether it is damages or disgorgement. The court concluded that "not all money claims are triable to a jury." *Id.* at 95. The court recognized restitution is an historical equitable remedy "by which defendant is made to disgorge ill-gotten gains or to

restore the status quo, or to accomplish both objectives.” *Id.* See also *SEC v. Dibella*, 409 F.Supp.2d 122, 129-130 (2006).

Finally, the *Commonwealth Chemical* court held:

...while from the standpoint of a defendant in an action for violation of the securities laws there may be no great difference between paying money in response to a private suit for damages and in an SEC action for injunction and disgorgement wherein the SEC makes the proceeds of disgorgement available to injured parties, the suit by the SEC is decidedly more analogous to the traditional jurisdiction of equity to award restitution.

Id. at 96. The court ultimately held that the plaintiffs were not entitled to a jury trial.

III. The Department’s request for civil penalties do not warrant a jury trial for the Defendants.

Although the Department has not found an Oklahoma case directly on point, other courts have determined civil remedies sought in an administrative enforcement proceeding are an important part of the equitable relief granted and do not trigger the right to a jury trial. Civil penalties do not serve a punitive purpose but instead, serve in a remedial fashion to make noncompliance costly. Penalties also reimburse governmental enforcement expenses that are generated during the costs of the litigation. *State of Vermont v. Irving Oil Corporation*, 955 A.2d 1098 (2008).

The civil penalties requested by the Department are incidental to the other remedies sought in this matter. In Oklahoma, “the presence of joined legal and equitable issues does not require a jury trial if the equitable issues are paramount or the legal issues incidental to or dependent upon the equitable issues.” *Oklahoma Oil & Gas Exploration Drilling Program 1983-A v. W.M.A. Corporation* at 612. Here, the Department’s equitable claims total in the millions, while its claim for civil penalties totals approximately \$120,000. This amount is incidental to the Department’s equitable claims.

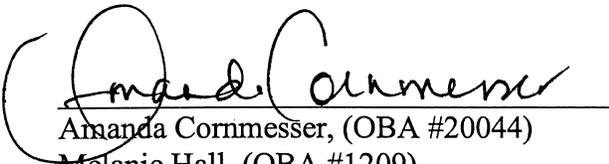
Conclusion

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

Respectfully submitted,

OKLAHOMA DEPARTMENT OF SECURITIES
Irving L. Faught, Administrator

By



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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the *Plaintiff's Memorandum*, was mailed this 13th day of April, 2009, by depositing it in the U.S. Mails, postage prepaid, to the following counsel of record:

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