

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

JAN 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 RESPONSE TO DEFENDANTS' MOTION TO RECONSIDER
THE DENIAL OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY
JUDGMENT**

Plaintiff, Oklahoma Department of Securities, *ex rel.* Irving L. Faught, Administrator (Plaintiff), respectfully submits this response to Defendants' motion for reconsideration of the Court's order denying their motion for partial summary judgment. Specifically, Defendants ask the Court to reconsider its finding that Defendants may be held jointly and severally liable to the same extent as Marsha Schubert, without a showing by the Administrator that Defendants were unjustly enriched by, through, or in connection with Marsha Schubert's purported investment program. Such order was filed on December 11, 2008. Plaintiff hereby adopts and incorporates by reference the

arguments and authorities cited in *Plaintiff's Response to Defendants' Motion for Summary Judgment*.

BACKGROUND

Between January of 2000, and October 14, 2004, Marsha Schubert, individually and doing business as Schubert and Associates, (collectively, "Marsha Schubert"), orchestrated a securities fraud in and from Crescent, Oklahoma. Marsha Schubert, promising large financial returns, accepted funds in excess of Two Hundred Million Dollars (\$200,000,000) for purported investment (the "Purported Investment Program"). The majority of the investment proceeds were deposited into Farmers & Merchants Bank (F&M) accounts controlled by Marsha Schubert (F&M Accounts).

The securities fraud had two components: 1) a "Ponzi" scheme in which most of the money entrusted to Marsha Schubert by participants in the Purported Investment Program was not invested in a legitimate venture, but instead, was paid out as purported returns to other participants in the Purported Investment Program; and 2) a check exchange scheme. The check exchange scheme involved a continual movement of funds primarily between the bank accounts of three individuals and one of the F&M Accounts. The scheme created a "float" that Marsha Schubert used to pay fictitious investment returns thereby perpetuating the "Ponzi" scheme.

On October 14, 2004, the Administrator of the Department (Administrator) filed suit against Marsha Schubert in the District Court of Logan County, State of Oklahoma, for violations of the Oklahoma Uniform Securities Act of 2004 (Successor Act), Okla. Stat. tit. 71, §§ 1-101 through 1-701 (Supp. 2003), and the Oklahoma Securities Act (Predecessor Act), Okla. Stat. tit. 71, §§ 1-413, 501, 701-703 (1991 & Supp. 2003). The

Administrator alleged, *inter alia*, that Marsha Schubert committed fraud in connection with the offer, sale, or purchase of securities. On November 15, 2004, upon the stipulation and consent of Marsha Schubert, the Logan County District Court entered a permanent injunction against Marsha Schubert. *Oklahoma Department of Securities ex rel. Irving L. Faught, Administrator v. Marsha Schubert, et al.*, CJ 2004-256. The Logan County Court also ordered that Marsha Schubert pay restitution to the defrauded investors. The amount of restitution owed by Marsha Schubert is still to be determined by the Logan County judge.

On May 5, 2005, Marsha Schubert entered a plea of guilty in the United States District Court for the Western District of Oklahoma to one count of money laundering in connection with the Purported Investment Program. *United States of America v. Marsha Kay Schubert*, CR 05-078.

On September 9, 2005, Marsha Schubert entered a plea of guilty in the District Court of Logan County, State of Oklahoma, to fourteen (14) counts of obtaining money by false pretenses in connection with the Purported Investment Program. *State of Oklahoma v. Marsha Kay Schubert*, No. CF-2004-391. Marsha Schubert stated as the factual basis for her plea that she obtained money in a "Ponzi" scheme in which she promised that the funds would be invested but instead, used the funds to pay prior investors involved in the Purported Investment Program.

CASE HISTORY

On April 21, 2006, the Administrator filed this suit alleging the Defendants and their agents materially aided Marsha Schubert's fraudulent conduct by: a) clearing checks written on uncollected funds, thereby providing Marsha Schubert with millions of dollars

in unsecured loans and the financial ability to extend the life of the Purported Investment Program and the “Ponzi” scheme; b) making loans to Marsha Schubert for purported purchases of cattle, vehicles, equipment, a mobile home, and real estate, and then depositing the loan proceeds into Schubert’s primary business account at F&M, allowing Marsha Schubert to further the “Ponzi” scheme; c) requesting deposits from Marsha Schubert to cover overdrafts when, in fact, Marsha Schubert did not have the means and ability to cover overdraft payments, other than by misappropriating the monies of others; d) preventing the discovery of the truth and bolstering Marsha Schubert’s credibility through the illusion of a prospering and legitimate investment venture; e) referring bank customers and other individuals to participate in the Purported Investment Program; and/or f) assisting bank customers in participating in the Purported Investment Program.

On June 5, 2006, Defendants moved to dismiss this action arguing the Administrator failed to state a claim upon which relief can be granted and challenging the Administrator’s authority to pursue a civil action for restitution against any person alleged to have materially aided another person in a securities fraud. This Court denied that motion.

On August 4, 2006, Defendants requested that this Court reconsider its ruling on their motion to dismiss. The Court did not change its ruling. Defendants subsequently brought a partial summary judgment motion based on the same arguments unsuccessfully presented to this Court in their previous motions. Defendants’ intent in filing the summary judgment motion was to establish that Plaintiff must prove Defendants were unjustly enriched by, through or in connection with the Purported Investment Program. On December 11, 2008, the Court issued its order denying said motion. Defendants now

ask this Court to consider and rule on this unjust enrichment issue for a fourth or fifth time. Defendants do so by arguing that the Department has reversed its legal position to now aver that Marsha Schubert violated Section 101 of the Predecessor Act or Section 1-501 of the Successor Act instead of violating Section 408 of the Predecessor Act or Section 1-501 of the Successor Act.

ARGUMENTS AND AUTHORITIES

I. Defendants' motion should be decided without a hearing pursuant to Rule 4.

By the very filing of the pending motion, the Court has been forced to reconsider its previous ruling on the issue of unjust enrichment as to Defendants. Since another oral argument on the issue is not necessary, Plaintiff asks that the hearing scheduled for February 13, 2009, be stricken and that the Court notify the parties of its decision by mail. *See* subsection (h) of Rule 4 of the Rules for District Courts of Oklahoma.

Defendants' motion is in substance an unauthorized and unjustified motion for new trial. A "motion to reconsider" is not recognized under Oklahoma's civil procedure statutes. *Pierson v. Canupp*, 1998 OK 47, n. 1, 754 P.2d 548, 550. As stated by the Oklahoma Supreme Court in *Pierson*, a "motion to reconsider" may be treated as a motion to vacate or a motion to modify under 12 O.S. §§ 1031 and 1031.1, or as a motion for new trial under 12 O.S. § 651, *if* timely made. *Id.*

Defendants do not cite any statutory authority in support of their Motion to Reconsider. Since the motion was filed exactly within ten (10) days of the Court's order denying the motion for summary judgment (excluding holidays and weekends), Plaintiff assumes that Defendants are requesting a new trial under 12 O.S. § 651.

Nine (9) causes are recognized for the granting of a new trial. *See* 12 O.S. § 651. Because none of the nine causes is applicable here, Defendants attempt to fabricate an “irregularity,” an “error of law” or “newly-discovered evidence” out of whole cloth by alleging that Plaintiff has reversed its legal position in regard to this case. Plaintiff remains consistent in its legal position – a position that has been appropriately interpreted by the Court in rendering its previous rulings regarding the elements of proof on the issue of joint and several liability.

II. The Court’s denial of Defendants’ partial summary judgment motion was in accordance with this state’s securities laws and the standard of review for such motions.

The summary judgment procedure is established in the Rules of the District Courts of Oklahoma. Rule 13 provides that when a party demonstrates to the court that no controversy exists as to any material facts, and the moving party is entitled to judgment as a matter of law, the Court has a duty to enter summary judgment in favor of that party. Rule 13, Rules for the District Courts of Oklahoma, OKLA. STAT. ANN. TIT. 12, Ch.2, App. (Rule 13); *Valley Vista Development Corp., Inc. v. City of Broken Arrow*, 1988 OK 140, 766 P.2d 344; *Flanders v. Crane Co.*, 1984 OK 88, 693 P.2d 602. Conversely, if a controversy exists as to a material fact, and/or if the moving party is not entitled to judgment as a matter of law, the Court must rule against the moving party by denying its motion for summary judgment.

Defendants claim that they were not unjustly enriched by, through or in connection with the Purported Investment Program. However, that fact is in dispute. *See* Plaintiff’s response to Interrogatory No. 23 in *Plaintiff’s Response to Defendants’ Requests for Admission and Second Set of Interrogatories*, attached hereto as Exhibit A.

As the moving party, Defendants have failed to demonstrate to the Court that the facts are uncontroverted as to their unjust enrichment and that they are entitled to summary judgment as a matter of law. According to Rule 13 and the applicable provisions of the Predecessor and Successor Acts, the Court rightfully decided to deny Defendants' summary judgment motion.

III. The basis for Defendants' motion is completely without merit.

In considering Defendants' joint and several liability in this matter, the Court has diligently and consistently interpreted the applicable provisions of Oklahoma's securities laws. Furthermore, the Court's interpretation has been consistent with Plaintiff's legal position as to the Defendants' liability. The gist of the motion fundamentally rejects the notion of substance over form.

As so succinctly stated by Mr. Ryan in the July 2nd hearing, "It doesn't matter what the basis of liability is. Before you ever get to the remedy, you have to establish [a] violation of law." See Transcript of Proceedings, at p. 15, lines 23-25, attached hereto as Exhibit B. Securities fraud violations under Oklahoma law are established by the language of Section 101 of the Predecessor Act and Section 1-501 of the Successor Act. Liability for such violations attaches through the provisions of Section 408 of the Predecessor Act and Section 1-509 of the Successor Act.

Department's Consistent Legal Position

Plaintiff has continually made the following representations to the Court in this matter: (1) that Marsha Schubert violated Section 101 of the Predecessor Act and Section 1-501 of the Successor Act; (2) that pursuant to Section 408 of the Predecessor Act and Section 1-509 of the Successor Act, Marsha Schubert is liable for 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 were made, not misleading – the exact language setting forth prohibited conduct in paragraphs (2) of Section 101¹ and Section 1-501²; (3) that Defendants materially participated or materially aided such conduct; and (4) that Defendants are liable jointly and severally with and to the same extent as Marsha Schubert. Plaintiff brings this action against Defendants pursuant to Section 408 of the Predecessor Act and Section 1-509 of the Successor Act based on their material participation or aid to Marsha Schubert in her violations of paragraphs 2 of Sections 101 and 1-501 – violations for which she is liable pursuant to Section 408(a)(2) of the Predecessor Act and Section 1-509(B) of the Successor Act.

Plaintiff's legal position on the issue of joint and several liability is identical to that of the courts in *Odor v. Rose*, 2008 WL 2557607 (W.D. Okla.), and *Nikkel v. Stifel, Nicolaus & Co., Inc.*, 1975 OK 158, 542 P.2d 1305, two of the cases cited by Defendants in their motion. With regard to the issue of secondary liability under the Predecessor and Successor Acts, the *Odor* court pronounced its task as “[determining] who the person(s) were who sold such securities **in violation of Section 301 or Section 1-301** of the applicable Act and **is liable under Section 408(a) or Section 1-509(B)** of the applicable Act.” *Id.* at *3 (emphasis added). The Oklahoma Supreme Court in *Nikkel* established that “the liability of the seller is a prerequisite for there to be liability as to one materially participating or aiding in the sale.” *Nikkel* at 1307. The *Nikkel* court continued by

¹ Section 101 of the Predecessor Act provides in pertinent part as follows: It is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly[:] . . . to make any untrue statement of a material fact or to omit 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[.]

² Section 1-501 of the Successor Act provides in pertinent part as follows: It is unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly: . . . [t]o make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statement made, in light of the circumstances under which it is made, not misleading[.]

summarizing the provisions of Section 408(a) of the Predecessor Act as limiting “liability to one who offers or sells the security that is **in violation of specified sections of the Oklahoma Securities Act.**” *Id.* (*emphasis added*).

Defendants take the liberty of putting words in the mouth of the Court on page 5 of their motion, with the excerpts used from the July 2nd hearing transcript, by interpolating the statutory references to Section 408 and Section 1-509. *See* Transcript of Proceedings, at pp. 24-25, attached hereto as Exhibit B. The transcript clearly shows that the court, at no time, discussed or otherwise specifically referenced violations of Section 408 of the Predecessor Act or Section 1-509 of the Successor Act by Marsha Schubert.

Likewise, in its response to Defendants’ initial motion for summary judgment, the Department did not cite Section 408 or Section 1-509 as the statutes violated by Marsha Schubert. Plaintiff simply cited to Section 408 and Section 1-509 as the statutory authority to impose joint and several liability for materially aiding Marsha Schubert’s conduct – conduct that was in violation of other sections of the Predecessor and Successor Acts.

Further, Plaintiff’s amended response to subsection (e) of Interrogatory No. 3, a technical objection that has become the stated cause of the pending motion, is no different from its previous arguments in other proceedings before the Court or the arguments made herein. While Plaintiff agrees that the imposition of liability on Marsha Schubert is authorized by Section 408 of the Predecessor Act and Section 1-509 of the Successor Act, the underlying violations for Marsha Schubert’s liability, and the Defendants’ joint and several liability, are Marsha Schubert’s violations of Section 101 of the Predecessor Act and Section 1-501 of the Successor Acts.

At no time has Plaintiff reversed its legal position. Defendants' stated argument provides no basis for the granting of a new trial under Section 651; therefore, their motion should be denied. Likewise, this Court should not vacate or modify the order denying Defendants' summary judgment motion pursuant to Section 1031 or 1031.1. The Court correctly based its order on the applicable principles of law.

Based on the facts relating to their actions or inaction, Defendants materially aided Marsha Schubert in the perpetuation of her investment fraud. In addition to imprisonment on criminal charges, Marsha Schubert is subject to the Logan County Court's order to pay restitution to the defrauded investors. Returning to the plain language of Section 408 of the Predecessor Act, a person who materially aids another who has violated the securities laws is "liable jointly and severally with and to the same extent as the [violator]." This means that Defendants are liable "in the same, identical way, and to the same extent and degree," as Marsha Schubert. *Barsch v. Mullins*, 1959 OK 2, 338 P.2d 845, 856. Following the opinion of the Oklahoma Supreme Court in *Barsch*, Defendants are liable, along with Marsha Schubert, for the full amount of restitution as determined by the Logan County Court. Whether or not Defendants were unjustly enriched is immaterial to the case at hand.

CONCLUSION

The case of *Dodson International Parts Inc. v. Hiatt*, 2004 WL 3037964 (D. Kan.), provides guidance when considering Defendants' pending motion. In *Dodson*, the defendants sought reconsideration of the court's order denying, in part, their motion for summary judgment by arguing that the provisions of the order "cast serious doubt" on the merit of certain of the plaintiff's legal theories. *Id.* at *1. The *Dodson* court responded as

follows: a “motion to reconsider ‘is not a second chance for the losing party to . . . dress up arguments that previously failed.’” *Id.*, citing *Voelkel v. Gen. Motors Corp.*, 846 F. Supp. 1482, 1493 (D. Kan.).

The Defendants herein should not be permitted another chance to present their previously failed oral argument by fabricating a basis for reconsideration by this Court. For the reasons discussed above, Plaintiff respectfully requests that the Court deny Defendants’ motion.

Respectfully submitted,

OKLAHOMA DEPARTMENT OF SECURITIES
Irving L. Faught, Administrator

By: 

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Attorneys for Department of Securities

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the *Plaintiff's Response to Defendants' Motion to Reconsider the Denial of Defendants' Motion for Partial Summary Judgment*, was mailed this 13th day of January, 2009, by depositing it in the U.S. Mails, postage prepaid, to the following counsel of record:

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Melissa Sue

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

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

Case No. CJ-2006-3311

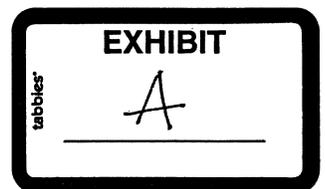
**PLAINTIFF'S RESPONSE TO DEFENDANTS' REQUESTS FOR ADMISSION AND
SECOND SET OF INTERROGATORIES**

Plaintiff, Oklahoma Department of Securities, *ex rel.* Irving L. Faught, Administrator, responds to the first request for admission and answers the second set of interrogatories put forth by Defendants as follows:

ADMISSION

REQUEST FOR ADMISSION NO. 1: Admit that the Defendants were not unjustly enriched at the expense of any short investors as part of Marsha Schubert's purported investment program.

RESPONSE TO ADMISSION NO. 1: Plaintiff objects to Request for Admission No. 1 on the ground of relevancy. As addressed by the Court in the hearing of July 2, 2008, Plaintiff is not required to prove that Defendants were unjustly enriched by and/or through the conduct of



Marsha Schubert, or any conduct of their own, in connection with this matter. Plaintiff must only prove at trial that Marsha Schubert was unjustly enriched by and/or through her violative conduct and that the Defendants materially aided such conduct. Hearing Transcript, pp. 24-25. Plaintiff does admit that Defendant Farmers and Merchants Bank received financial profits by servicing the bank accounts of Marsha Schubert during the subject time period. The total amount of such profits is not known by Plaintiff at this time and will not be known until the completion of discovery in this matter.

INTERROGATORIES

INTERROGATORY NO. 23: If you deny Request for Admission No. 1, please identify the following:

- (a) amount of Defendants' unjust enrichment;
- (b) the identity of those short investors by whom Defendants were unjustly enriched;
- (c) all documents relied upon by you that support your claim that Defendants were unjustly enriched.

RESPONSE TO INTERROGATORY NO. 23: Plaintiff objects to Interrogatory No. 23 on the ground of relevancy. As addressed by the Court in the hearing of July 2, 2008, Plaintiff is not required to prove that Defendants were unjustly enriched by and/or through the conduct of Marsha Schubert, or any conduct of their own, in connection with this matter. Plaintiff must only prove at trial that Marsha Schubert was unjustly enriched by and/or through her violative conduct and that the Defendants materially aided such conduct. Hearing Transcript, pp. 24-25. Plaintiff does admit that Defendant Farmers and Merchants Bank received financial profits by servicing the bank accounts of Marsha Schubert during the subject time period. The total amount of such profits is not known by Plaintiff at this time and will not be known until the

completion of discovery in this matter.

INTERROGATORY NO. 24: In terms of a total dollar amount, how much do you claim Marsha Schubert was unjustly enriched at the expense of the short investors in Schubert's purported investment program?

RESPONSE TO INTERROGATORY NO. 24: To be submitted.

INTERROGATORY NO. 25: With respect to Interrogatory No. 24 above, please identify the following:

- (a) how you arrived at your answer to Interrogatory No. 24 above;
- (b) the identity(ies) of the short investors by whom Marsha Schubert was unjustly enriched;
- (c) the amount of money Marsha Schubert was unjustly enriched per short investor;
- (d) how you were able to trace Marsha Schubert unjust enrichment to each short investor identified by you in your answer to subparagraph (b).

RESPONSE TO INTERROGATORY NO. 25: Plaintiff relies on a financial analysis based on the records for bank accounts owned and/or controlled by Marsha Schubert. Specifically, the amount by which Marsha Schubert was unjustly enriched with respect to each investor is the net difference between the total amount of monies transferred to Marsha Schubert by the investor, and the total amount of disbursements received from Marsha Schubert by each investor. *See* the records for each "short investor" previously provided by Plaintiff in response to Defendants' requests for production of documents and Plaintiff's amended response to Defendants' Interrogatory No. 3.

INTERROGATORY NO. 26: Are you seeking an order of restitution against Defendants with respect to the amounts lost by the Intervenors in Marsha Schubert's purported investment

program?

RESPONSE TO INTERROGATORY NO. 26: With the exception of Richard Reynolds as trustee of the Richard Reynolds Living Trust, the Intervenors may benefit from any recovery obtained by Plaintiff in this matter.

Oklahoma Department of Securities

By:


Irving L. Faught, Administrator
120 N. Robinson, Suite 860
Oklahoma City, OK 73102

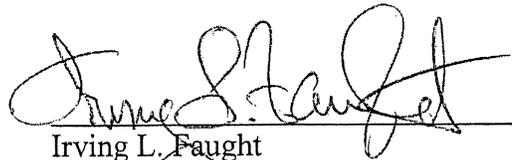
As to the interrogatories to which objections have been made:

By:


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STATE OF OKLAHOMA)
) ss.
COUNTY OF OKLAHOMA)

I, Irving Faught, of lawful age, being first duly sworn, upon oath states that he is the Administrator of the Oklahoma Department of Securities and is authorized to make the above answers on behalf of the Oklahoma Department of Securities, that the above answers have been prepared with assistance of counsel, that the answers are based either on his personal knowledge, the personal knowledge of the Oklahoma Department of Securities, or on information obtained from Oklahoma Department of Securities records, and that the answers are true to the best of my information and belief.


Irving L. Faught

Subscribed and sworn to before me this 12th day of December, 2008.

 BREANDA LONDON
Notary Public
State of Oklahoma
Commission # 05009046 Expires 09/28/09


Notary Public

CERTIFICATE OF MAILING

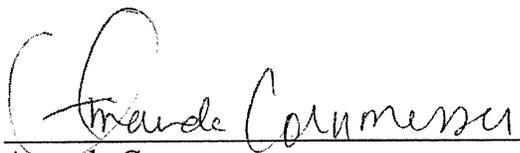
I hereby certify that a true and correct copy of the Plaintiff's Response to Defendants' Requests for Admission and Second Set of Interrogatories was mailed this 12th day of December, 2008, by depositing it in the U.S. Mails, postage prepaid, to the following counsel of record:

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Amanda Commesser

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1 (whereupon, the following proceedings were had on
2 the 2nd day of July, 2008, to-wit:)

3 THE COURT: We're on the record in the case of
4 Oklahoma Department of Securities versus Farmers and
5 Merchants Bank, Case No. CJ-2006-3311. I have pending
6 before the Court today the defendants' motion for summary
7 judgment. And then I also have the response by the
8 plaintiff, and the reply that was filed by the defendants.

9 And so, Counsel, if you will please approach, we
10 will just do oral argument from the bench.

11 Counsel, also, if I can get everyone to please
12 announce their appearances for the record.

13 MS. CORNMESSER: Amanda Cornmesser for the
14 Department.

15 MS. HALL: Melanie Hall for the Department.

16 MR. RYAN: Pat Ryan for the defendants, your
17 Honor.

18 THE COURT: Okay. I have -- first, I would note
19 that this -- just the issue of whether or not there was
20 even a claim for restitution has been before the Court
21 before on a motion to dismiss and to reconsider. I had
22 previously ruled that this was a remedy that was available
23 to the Department.

24 Before the Court today is a motion for summary
25 judgment asserting that there are no facts to support the

1 claim for restitution and that the summary judgment should,
2 therefore, be granted.

3 Let me tell you my understanding of -- at least my
4 understanding of the law, and you can certainly correct me
5 if either side thinks I'm wrong. It's my understanding in
6 the petition the plaintiff has asked for restitution for
7 the creditors of Ms. Schubert's companies. And then has
8 also asked for restitution on behalf of what we refer to I
9 think before as the relief investors. And I think,
10 thirdly, there was a claim for such other relief that the
11 Court deems proper.

12 The issue, as I see it in the motion before me, is
13 whether or not under both claims -- and the claim for
14 restitution, whether or not that includes just making the
15 parties whole that have been damaged, versus a disgorgement
16 remedy, which isn't necessarily designed to make the
17 parties whole but to the recover the ill-gotten gains, I
18 think is the way that the Court has referenced that.

19 Let me first say that I do not think that the
20 Department of Securities has the ability to seek damages on
21 behalf of anyone. And let me ask the Department,
22 Ms. Cornmesser, do you-all disagree with that that --

23 MS. CORNMESSER: We do not. We agree with you.

24 THE COURT: You do agree with that. So the issue
25 is what exactly is the Department entitled to under the

1 term "restitution" and does that -- let me ask this: Do
2 you-all agree -- because there were cases that indicated
3 that restitution -- and I think even in your brief, the SEC
4 case that you-all cited, it talked about how restitution is
5 not based on compensating the plaintiff but forcing the
6 defendant to disgorge benefits that it would be unjust for
7 him to keep. And there is another clause in there that
8 says:

9 "Disgorgement is an equitable remedy designed to
10 deprive the defendant of his unjust enrichment and to
11 deter him from violating securities laws."

12 So let me just first ask: On your claim for
13 restitution, are you seeking restitution in order to make
14 the claimants and creditors whole? Or are you seeking
15 restitution -- you seem to make a distinction between
16 restitution that is designed to make the parties whole
17 versus disgorgement which is to attempt to receive
18 ill-gotten gains.

19 MS. CORNMESSER: That's correct.

20 THE COURT: So you're seeking simply as a
21 disgorgement remedy?

22 MS. CORNMESSER: We're seeking to make restitution
23 to make the parties whole. Our statute 1-603 permits us to
24 either ask the Court to seek disgorgement or restitution.
25 We're seeking restitution in this case. And in the relief

1 defendant case, we were seeking unjust enrichment for
2 ill-gotten gains. We're seeking restitution in this case
3 because the bank aided in the securities fraud.

4 THE COURT: And I thought the purpose of
5 restitution -- okay. So is that not the same thing as
6 saying that you're seeking damages for the defendant?

7 MS. CORNMESSER: No. We're seeking restitution
8 because the bank is jointly and severally liable to the
9 primary violater, who is Marsha Schubert. That's what our
10 act allows for.

11 THE COURT: Then to make restitution, if you're
12 seeking restitution to make the persons whole, do you agree
13 that you have to, in order to show that you're entitled
14 to -- the joint and several issue to the side -- do you
15 agree that for them to be jointly and severally liable you
16 would have to show the bank and the three individual
17 defendants were somehow unjustly enriched?

18 MS. CORNMESSER: No. We believe that showing that
19 they materially aided or participated in securities fraud
20 allows us to seek restitution in this matter.

21 THE COURT: Even if they received no benefit?

22 MS. CORNMESSER: That's correct.

23 THE COURT: Okay. Mr. Ryan.

24 MR. RYAN: Thank you very much for hearing us this
25 morning. I appreciate you setting this down specially.

1 Your Honor, you hit the nail on the head; that's the issue
2 before the Court. We believe that the statute that is
3 cited here by the Department, 71 O.S. 1-603, provides for
4 only equitable remedies. I have a copy of it here, your
5 Honor, if you would like to see it. I think you're
6 familiar with it.

7 THE COURT: I have got a copy of it.

8 MR. RYAN: It lays out that the Department is
9 entitled to seek a temporary restraining order, injunctive
10 relief, declaratory judgment relief, restitution. The old
11 statute says restitution, the new statute says restitution
12 or disgorgement. We don't think it makes any difference as
13 between the two statutes.

14 The petition that has been filed in this case --
15 and I only brought the last three pages because I think
16 they're the most relevant -- if your Honor would like a
17 copy of it, I have it here.

18 It makes it very clear that the Department is
19 seeking only equitable remedies. If you look at the very
20 first prayer for relief, it is for injunctive relief. And
21 you see they're asking for restitution which is, again,
22 equitable remedy. And then you turn to the next page, the
23 very last paragraph:

24 "Such other equitable relief as the Court may deem
25 necessary."

1 Then you look at the affidavit signed by
2 Mr. Fought, the administrator of the Department, he makes
3 it very clear where he says he has read the foregoing
4 petition for injunction and other equitable relief.

5 So it's very clear, your Honor, that the statute
6 only provides for equitable relief. The petition in this
7 case only seeks equitable relief. I think that there can't
8 be any disagreement that seeking damages is classic relief
9 under the law, as opposed to equity.

10 Your Honor, in the motion we filed for partial
11 summary judgment, we set forth the fact that the bank has
12 not been unjustly enriched, and the Department didn't take
13 issue with that nor could they. The bank hasn't received
14 anything, hasn't benefitted in any way. So there is no
15 disputed fact. The Court doesn't need to be concerned as
16 to there being disputed facts.

17 The law, your Honor, in Oklahoma, is very clear on
18 restitution. We cited the Stites case. I have a copy of
19 it with me.

20 THE COURT: I have it.

21 MR. RYAN: It says on page 10:

22 "Restitution is an equitable remedy that generally will
23 be available when everyone has received a benefit to
24 which another is justly entitled. A person who has
25 been unjustly enriched at the expense of another is

1 required to make restitution to the other."

2 They put that in italics. So the Department is
3 asking the Court essentially to go directly against a 1995
4 Oklahoma Supreme Court case that holds that restitution is
5 an equitable remedy available only against persons who have
6 been unjustly enriched.

7 Your Honor, we would suggest that this makes
8 perfect sense from the statutory scheme for a regulator
9 that they be -- because their primary purpose is to protect
10 the public and, therefore, they should have injunctive
11 relief, and they should have the ability to get back
12 ill-gotten gains of someone who has been unjustly enriched.
13 But legal remedies, the remedy to go out and sue someone
14 for damages, that's not a right that the Department has.

15 We haven't sought this partial summary judgment
16 against the individual investors in this case because we
17 don't believe we have the right to do that. It's the
18 Department, and only the Department, that has the
19 obligation of proving unjust enrichment, which they cannot
20 do. The Department has cited no cases, not a single case
21 from the state of Oklahoma, that suggests that restitution
22 is not an equitable remedy or that restitution does not
23 have as a required element unjust enrichment.

24 THE COURT: Let me ask: Is it the Department's
25 position that you do not have to establish the elements of

1 unjust enrichment with regard to the bank because if you
2 simply establish that they have aided and abetted, even if
3 they received no gain as a result of that, that that alone
4 is sufficient, that you don't even have to establish any
5 detriment to anyone or benefit to the bank?

6 MS. CORNMESSER: Well, I think we need to
7 establish the three elements of how they materially aided
8 or participated. And once we have the ability to show that
9 to the Court, then restitution would come in as the remedy.
10 And they're jointly and severally liable, then, to the same
11 extent that Marsha Schubert was.

12 The Court has already found that Marsha Schubert
13 should pay restitution. If the Court finds that they did
14 materially aid in the securities fraud, then they're
15 jointly and severally liable, period.

16 MR. RYAN: Your Honor, the trials are very, very
17 different. The investor trial by all accounts are very
18 different than the type of remedy that the Department is
19 seeking. I agree that the Department has to show that
20 there has been a violation of the Securities Act by the
21 bank or the defense in this case. There is no question
22 about that.

23 But under the statutory scheme, if they prove
24 that, they don't have to prove anything else, other than
25 unjust enrichment. If they're able to prove those two

1 things, then they simply are entitled to an award for the
2 amount of the unjust enrichment, which in this case there
3 isn't any. But if there was, that's what their remedy
4 would be, that's what their judgment would be for.

5 But here -- but a trial for damages is very -- of
6 course, the first one, the one that I just mentioned where
7 if they're able to prove the violation of the Securities
8 Act, and if they're able to prove unjust enrichment, it is
9 tried to the Court, there is no jury. There is not any of
10 the traditional defenses that investors have to face in the
11 investor case.

12 But, for example, Mr. Bocock's case, he's going to
13 have to face the problems of negligence on the part of his
14 investors, carelessness on their part, the fact that they
15 didn't ask for or receive monthly statements or any kind of
16 statements concerning their investments. The Department
17 isn't in that position, so you have very, very different
18 remedies here.

19 And the Department seems to want to take the
20 position that we're entitled to simply prove violation,
21 then we win. We don't have to give you any discovery, we
22 don't have to put any investors on, we don't have to do
23 anything. Well, that doesn't even make common sense. The
24 only way that would make sense is if the defendant was
25 undeniably unjustly enriched.

1 THE COURT: Okay. And, again, when I first read
2 these briefs I thought this was such a simple issue. And I
3 have spent literally hours trying to figure out what the
4 ruling in this case should be.

5 So just to make certain that I understand still
6 again, the Department's position is that unjust enrichment
7 has been established and restitution ordered, at a minimum.
8 And I realize that you disagree, perhaps, with this, but
9 that Marsha Schubert was unjustly enriched and she,
10 therefore, has to make -- that the investors contributed
11 money, she didn't do what she was supposed to, she made a
12 profit, and the relief defendants, I guess, really made a
13 profit and, therefore, there has been an established --
14 that you think there has been or can be established that
15 there has been an unjust enrichment that has occurred at
16 least on behalf, I guess, of Marsha Schubert, that she
17 received money and profited and didn't -- at the expense
18 of, at a minimum, the relief defendants.

19 MS. HALL: Of the losing investors.

20 THE COURT: Okay. And then it's your position
21 that as long as Schubert has been determined -- you have
22 established the elements with regard to Schubert, that
23 anyone that aided or abetted, even if they did not
24 themselves experience unjust enrichment, are responsible
25 for the fact that she was unjustly enriched. Is that --

1 MS. HALL: If I may, your Honor.

2 THE COURT: Yes.

3 MS. HALL: Marsha Schubert was found guilty and
4 plead guilty to a security scheme that she orchestrated.
5 She was found guilty of committing the securities fraud.
6 And the Court has ordered her to make restitution in an
7 amount to be determined, which is dependant upon what is
8 happening in the relief defendant cases and the
9 arbitrations that have been privately sought.

10 Our position is that once we prove that the
11 defendants in this case materially aided that scheme, that
12 they're liable jointly and severally to the same extent as
13 Marsha Schubert, meaning they're subject to the identical
14 sanctions that were imposed on her by the Logan County
15 Court.

16 I think one point that we would like to make in
17 connection with the Stites case that Mr. Ryan references,
18 that particular statute I believe only referenced
19 restitution, it did not say restitution and disgorgement.
20 Our statute specifically says restitution, disgorgement,
21 and rescission. And I think under the rules of statutory
22 construction you have to give credence to each word that
23 the legislature used, meaning that you can distinguish
24 between the terms rescission and disgorgement --
25 restitution and disgorgement.

1 And I believe it's also important to note in the
2 Diacide case, which you relied heavily on in your first
3 ruling in this case, that the Department may seek any
4 sanctions that the investor can. We don't have to be the
5 victim. And we can seek whatever remedy is available to a
6 private investor.

7 As a result of that, we feel like we're asking
8 this Court to order or -- to order the restitution against
9 the bank defendants. We're not seeking damages under the
10 sense of our statute which allows for interest and attorney
11 fees. We're only asking for that amount to make -- to
12 restore the losing investors to make them whole.

13 MR. RYAN: Your Honor, I wasn't at the first
14 hearing, but I can't believe that you ruled that the
15 Securities Department has the same rights as an investor,
16 because the Department has already admitted in this hearing
17 they don't have the right to sue for damages. They don't
18 have that right. They only have equitable remedies.

19 The fact that -- what the Department seems to be
20 doing is coddling together a liability section with the
21 remedy section that applied only to them. I mean, we agree
22 that no matter who you are the liability sections of the
23 Securities Act apply. It doesn't matter whether you're
24 Marsha Schubert or the bank.

25 But when you're talking about the remedy that is

1 available to the Department, you have to look to the
2 statute. And the statute simply doesn't give the
3 Department what they're telling the Court that they're
4 entitled to.

5 THE COURT: Let me ask this: what do you think,
6 then, if the Department's only claim against you is under
7 this subpart that says that the bank materially aided in
8 the conduct and that they're liable unless you can show on
9 behalf of the bank that they didn't know or through
10 reasonable care couldn't have known that this conduct was
11 going on, what do you -- do you not think that all they
12 have to establish is that you aided her?

13 And then the second part of that is, yes, that she
14 was therefore unjustly enriched. But do you believe that
15 each person that they would, perhaps, allege materially
16 aided her has to also show they were unjustly enriched?

17 MR. RYAN: No. I think the only person -- the
18 person that they're seeking the remedy against, the
19 restitution remedy against, that person must be unjustly
20 enriched.

21 THE COURT: Even if it's under the aiding and
22 abetting?

23 MR. RYAN: It doesn't matter what the basis of
24 liability is. Before you ever get to the remedy, you have
25 to establish violation of law. I don't disagree that the

1 bank -- excuse me -- that the Securities Department has to
2 show a violation by the bank of the securities law. No
3 question about that. I'm not arguing that. I think the
4 Court was perfectly correct in ruling Marsha Schubert owed
5 restitution in this case because she had been unjustly
6 enriched.

7 But to do what the Securities Department seems to
8 want to do is to take away all the defenses that the bank
9 has. In other words, the bank has the right to put these
10 investors on the stand and ask them, "Did you get a monthly
11 statement? Did you ask Marsha Schubert for a monthly
12 statement? what happened?" We're entitled to all of those
13 kinds of defenses that any defendant in a securities case
14 has unless you're talking about an equitable remedy which
15 is given here to the Securities Department.

16 In that case, if it's an equitable remedy, and
17 they prove the violation, then all they have to do is show
18 the unjust enrichment. They can't do that against the
19 bank. So they simply don't have the right to seek
20 restitution against a party who has not been unjustly
21 enriched. And they haven't cited your Honor a single case
22 in the entire history of this state where that's ever been
23 permitted.

24 THE COURT: Okay.

25 MS. HALL: Again, your Honor, I think there is

1 federal law that supports our position and asks -- there is
2 an Oklahoma Supreme Court case that says that we can look
3 to the federal security statute and the case law
4 interpreting those statutes in giving the Court this
5 state's guidance in determining the Oklahoma securities
6 laws.

7 In response to Mr. Ryan, I think it's important to
8 note that we're not saying that they can't put on testimony
9 from these witnesses when we get to that point, when we get
10 to trial. We are only in, you know, after two years,
11 having heard a motion to dismiss and now this motion for
12 summary judgment. We're not saying that that's not going
13 to happen when we get to trial. We have not even really
14 begun discovery, and that's something that will occur later
15 on down the road.

16 MS. CORNMESSER: Your Honor, I think we would also
17 like to point out that we never said that the bank was not
18 unjustly enriched. We just said it's not a material fact.
19 And based on that, we haven't even gone through discovery
20 to find out what they were unjustly enriched, if they were.
21 So this is a premature request, and it's improper for a
22 motion for summary judgment.

23 MR. RYAN: Your Honor, we stated specifically as
24 an undisputed fact that the bank has not been unjustly
25 enriched. If they had any argument or any facts against

1 that, it was their obligation to come forward in the
2 response to summary judgment and set it out. They did not
3 do that. And I would state there is absolutely no evidence
4 this bank received any benefit whatsoever from
5 Ms. Schubert's scheme.

6 MS. CORNMESSER: Your Honor, I have read the
7 undisputed facts a hundred times, and I have yet to find
8 where they say that the defendants were not unjustly
9 enriched.

10 THE COURT: And I have to agree. I looked for
11 that too, and I didn't specifically see that as an
12 undisputed fact. But, perhaps, I just missed it also.

13 MR. RYAN: I will get it.

14 THE COURT: If you would, please.

15 MR. BOCOCK: Your Honor, I have a very limited
16 role in this. I just heard Mr. Ryan say something that I
17 don't want anyone to think is true.

18 THE COURT: Why don't you wait until Mr. Ryan gets
19 back up here.

20 MR. BOCOCK: I will.

21 MR. RYAN: Your Honor, we set forth in the motion
22 that there were certain loser investors. And we know where
23 the money went. And the receiver has been doing all this
24 work to track down all the money, who lost the money, who
25 gained the money. And nowhere is anybody suggesting that

1 the bank got any of the money. They just weren't involved
2 in the scheme.

3 THE COURT: Okay. And I do remember there was a
4 paragraph where you referenced the report that showed that
5 certain people received X dollars, and the bank wasn't
6 specifically mentioned as someone that had.

7 MS. CORNMESSER: Only the bank officers are on
8 there.

9 THE COURT: Right. Right. Okay. Mr. Boccock had
10 something he wanted to say on the record.

11 MR. BOCOCK: I just wanted to make this point:
12 Mr. Ryan says that in a lawsuit in which he faces only the
13 investors, the investors' negligence is relevant; that's
14 not true. It was in the other two lawsuits I tried,
15 because I asserted a negligence claim. Here, the petition
16 intervention only asserts a violation of the Oklahoma
17 Securities Act. If they aided and they abetted, they are
18 liable, period. So it doesn't change in any way the proof
19 that would be tried in this case or the streamline nature
20 of trying the two claims together.

21 MR. RYAN: I don't agree with that at all, nor is
22 it relevant to this hearing. The important aspect of this
23 is he's entitled to a jury trial, they are not.

24 THE COURT: Right. And he just indicated that you
25 had made a statement like that and he just wanted it on the

1 record that he disagrees with it.

2 MR. RYAN: I have never had a case yet where
3 Mr. Bocock agreed with me or, for that matter, anyone else.

4 Your Honor, I don't know what more to say. We
5 have a Supreme Court case that specifically states what
6 restitution is, that it requires unjust enrichment. It's
7 very clear.

8 THE COURT: And I agree wholeheartedly that unjust
9 enrichment requires a showing that someone has something
10 that in good faith they shouldn't keep. But what I'm
11 struggling with here is whether or not under the claim that
12 if a person materially aids in the conduct, the whole issue
13 of does the unjust enrichment have to be shown on behalf of
14 the person who is aided, are they the ones that have to
15 show some element of unjust enrichment, or is it the party
16 who they were aiding was unjustly enriched?

17 MR. RYAN: The only person that you can seek
18 restitution against is someone who was unjustly enriched;
19 that's what restitution is.

20 THE COURT: Well, but what about the joint and
21 several liability aspect of this that if you materially aid
22 you're jointly and severally liable?

23 MR. RYAN: But for what? I agree there may be
24 liability, but there is at least two elements to the
25 state's claim: One is liability, let's get by that; the

1 second one is, what is the remedy if there is a violation.

2 THE COURT: The remedy that the Department is
3 arguing is if you materially aided them in -- aided
4 Schubert in her conduct that you're jointly and severally
5 liable for the restitution that she's been ordered to pay.

6 MR. RYAN: And the Department has not cited a
7 single case for that proposition, not a single case. And
8 it goes directly against the Stites case, it goes directly
9 against the Warren case.

10 THE COURT: But neither of those cases deal with
11 the aspect of the situation here where your client is only
12 being named as a party because of the material aiding in
13 the conduct. And that's where I'm still -- and, perhaps,
14 we're just not communicating. But I agree that if they had
15 not established unjust enrichment -- and I agree that under
16 unjust enrichment that you have to show that there was some
17 sort of benefit that someone obtained that they weren't
18 entitled to.

19 And what I'm struggling with here is whether or
20 not if you're simply being named in a lawsuit under this
21 statute, that if you materially aided someone in their
22 conduct and that conduct resulted in them being unjustly
23 enriched, is that sort of helping them?

24 MR. RYAN: I understand that, your Honor, but the
25 statute -- the part where you're reading from, the

1 liability sections, is not limited to access by the
2 Department. They're setting out a statutory scheme by
3 which people can sue under the securities laws in Oklahoma.
4 It applies to Mr. Bocock's clients, it applies to the
5 Department.

6 THE COURT: Right.

7 MR. RYAN: But just because you have liability
8 under the liability section does not give the State greater
9 remedies than they have under the 71 1-603; that is what
10 describes their remedies. Under that section, they simply
11 don't have the right to collect legal damages. They only
12 have the right to get restitution. We know that
13 restitution requires unjust enrichment.

14 THE COURT: And I do remember one of the cases --
15 I think it was one of the cases cited by the defendant --
16 indicated that often the results of a request for
17 restitution and damages may be similar because -- or you
18 may get enough in your restitution to actually award the
19 people the damages they're entitled. But the Court made it
20 very clear that a request for damages on behalf of the
21 defendants, which is what Mr. Bocock is seeking, is totally
22 separate from a claim of restitution.

23 MS. HALL: Your Honor, if I can add one more
24 thing. I think going back to the Diacide case which,
25 again, is based on Iowa statutes, which formed the

1 securities laws as well as -- like the Oklahoma statute.
2 And I think the Court in Diacide made it very clear that
3 the language of the statutes is so broad that it includes
4 people who aid and abet; that is the term that is used,
5 along with the primary violators. And at one point the
6 Court says --

7 THE COURT: Well, and our statute specifically
8 says if you materially aid.

9 MS. HALL: Correct. And the Diacide court said
10 that:

11 "Material participants are liable jointly and severally
12 with and to the same extent as the primary wrongdoer
13 and are subject to the same sanctions, to include
14 restitution as the primary violator. To hold otherwise
15 would render meaningless the language establishing
16 joint and several liability."

17 MR. RYAN: That's not the law of Oklahoma.

18 THE COURT: Right. I understand that.

19 MR. RYAN: We have cited what restitution means in
20 Oklahoma.

21 THE COURT: Right. But what I haven't seen from
22 anyone is an Oklahoma case that talks about the issue that
23 I think is before me, and that is if you're being charged
24 for materially aiding someone, does the unjust enrichment
25 have to apply both to the bank in this case as well as the

1 person, or is just aiding someone else to become unjustly
2 enriched sufficient?

3 MR. RYAN: Doesn't that suggest to the Court that
4 the State's argument is invalid in that they can't find a
5 single case in the history of Oklahoma where someone or the
6 Securities Department has been found in their favor to
7 obtain restitution from a party that received no benefit
8 from the transaction in question? They can't cite a single
9 case for that.

10 THE COURT: Well, it just tells me that, as with
11 all of the other issues that I ruled on involving this
12 whole Marsha Schubert scheme, I found no law on anything.
13 That's why I think I'm on appeal on everything right now
14 that I have ever ruled on in this case.

15 MS. HALL: It is a case of first impression with
16 respect to many of the issues. I have been with the
17 Department for 25 years, and this is the first time that we
18 have relied on the statute, so there is no case law.

19 THE COURT: Here is my ruling: I am going to deny
20 the motion for summary judgment. And I want to make it
21 real clear for the record for appellate purposes the
22 reasons why. I believe that under the statute that they're
23 suing to make the bank liable the material -- a person who
24 materially aids -- I believe that what they have to
25 establish to prevail against the bank is that the bank

1 materially aided Marsha Schubert in her conduct that was a
2 result of the Ponzi scheme. And that as long as they can
3 establish that Marsha Schubert was unjustly enriched, the
4 bank itself did not have to be unjustly enriched under the
5 material aiding.

6 So what I think this is going to go to trial on
7 is: Number One, did Marsha Schubert participate or conduct
8 herself in a way that was in violation of the statute and,
9 if so, did the bank materially -- and I think that had to
10 result in unjust enrichment to her -- if so, did the bank
11 materially aid her in that conduct? And that will go
12 through all of the elements that are set forth in here
13 about whether or not the bank knew or should have known.

14 And if it's determined that she did participate,
15 or she was involved in the conduct, the bank materially
16 aided her, then I think under the joint and several statute
17 the bank can be liable jointly and severally for the fact
18 that she was unjustly enriched.

19 MS. CORNMESSER: Thank you, your Honor.

20 THE COURT: And I know the way that Mr. Ryan is
21 shaking his head he disagrees with my ruling.

22 MR. RYAN: Your Honor, I mean no disrespect.

23 THE COURT: I know. Thank you-all very much.

24 (Conclusion of proceedings.)

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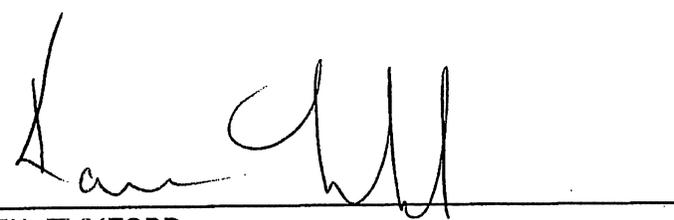
STATE OF OKLAHOMA)
COUNTY OF OKLAHOMA)

C-E-R-T-I-F-I-C-A-T-E

I, Karen Twyford, Certified Shorthand Reporter, in and for the County of Oklahoma, State of Oklahoma, do hereby certify that the foregoing transcript is a true, correct, and complete transcript of my stenographic notes.

I further certify that I am not related to any of the parties herein, nor am I interested in any way in the outcome of these proceedings.

WITNESS my Hand this 04 day of July, 2008.



KAREN TWYFORD
CERTIFIED SHORTHAND REPORTER
CERTIFICATE NO. 01780

Karen S. Twyford
Oklahoma Certified Shorthand Reporter
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Exp. Date: December 31, 2008