

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
SHERMAN DIVISION**

**JENNIFER ECKLUND, RECEIVER**

**Plaintiff,**

v.

**ROBERT AND SANDRA BAILEY, et al.**

**Defendants.**

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**Ancillary Civil Action No. 4:18-cv-359**

**ROBERT AND SANDRA BAILEY’S RESPONSE TO THE RECEIVER’S MOTION FOR  
SUMMARY JUDGMENT AGAINST CERTAIN WINNING INVESTORS**

Robert and Sandra Bailey (the “Baileys”) file this Response to the Receiver’s Motion for Summary Judgment Against Certain Winning Investors (the “Motion”).

**Summary of Relief Requested**

The Baileys request an order from the court denying the Motion. The court should deny the Motion because there is a fact issue regarding whether the Baileys constitute a “winning investor”, i.e. whether they received more from the alleged Ponzi scheme than they paid into it. Indeed, the evidence establishes that the Baileys’ investment in the Wammel Group, dating back to 2006, exceeds the funds they received from the alleged Ponzi scheme. Thus, the Baileys provided reasonably equivalent value for the transfers they received, and the Receiver’s claims against them therefore fail as a matter of law.

**Response to the Issues Presented**

The Baileys respond to each of the specific issues presented by the Receiver in the Motion as follows:

- a. Whether the Receiver can avoid the Transfers under TEX. BUS. & COMM. CODE § 24.005(a)(1) as a matter of law when the Bryant Defendants and the Wammel Defendants operated a series of interlocking Ponzi schemes, the

Transfers to the Certain Winning Investors were in furtherance of the Ponzi scheme, BUCF and the Wammel Group, as a part of the Ponzi scheme, were insolvent from their inception, and the Certain Winning Investors provided no reasonably equivalent value in exchange for the Transfers.

**Response:** The Receiver's claim under TEX. BUS. COMM. CODE § 24.005(a)(1) fails as a matter of law because they are barred by Section 24.009 of the same code. Section 24.009 expressly provides that a transfer is not avoidable under Section 24.005(a)(1) if they are received in good faith and for reasonably equivalent value. The Baileys received all transfers without knowledge of the alleged Ponzi scheme, and instead believed they were receiving a return of their investment. Thus, the Bailey's received the transfers in good faith. Moreover, the Bailey's summary judgment evidence establishes that they provided reasonably equivalent value for the transfers as the Baileys invested more with the Wammel Group than they received.

- b. Whether the Receiver can avoid the Transfers under TEX. BUS. & COMM. CODE § 24.005(a)(2) as a matter of law when the Bryant Defendants and the Wammel Defendants operated a series of interlocking Ponzi schemes, the Transfers to the Certain Winning Investors were in furtherance of the Ponzi scheme, BUCF and the Wammel Group, as a part of the Ponzi scheme, were insolvent from their inception, and the Certain Winning Investors provided no reasonably equivalent value in exchange for the Transfers.

**Response:** The Receiver's claims under TEX. BUS. COMM. CODE § 24.005(a)(2) fail as a matter of law because the Bailey's summary judgment evidence establishes that they provided reasonably equivalent value for the transfers as the Baileys invested more with the Wammel Group than they received.

- c. Whether the Certain Winning Investors were unjustly enriched at the expense of the BUCF and Wammel Group investors.

**Response:** The Receiver's claim for unjust enrichment fails because there is a fact issue regarding whether the Bailey's received anything other than their original investment in the Wammel Group.

- d. Whether a constructive trust should be imposed as a matter of law on any property, real or personal, purchased by the Certain Winning Investors with the Transfers from the Bryant Defendants and Wammel Defendants.

**Response:** The Receiver is not entitled to a constructive trust remedy as she has not established her right to judgment on her fraudulent transfer or unjust enrichment claims.

**Statement of Disputed Facts**

The Bailey's dispute the following facts set for the in the Motion:

1. Robert and Sandra Bailey transferred \$200,000 to the Wammel Group on or about January 11, 2012.

Response: Robert and Sandra Bailey also transferred \$179,800.00 to the Wammel Group in 2006. *See* Exhibit 1.

15. The over \$1.3 million in net transfer from the Bryant Defendants and Wammel Defendants to the Certain Winning Investors were comprised of investor funds.

Response: The \$377,315.00 transferred by the Wammel Group to the Baileys reflects only a return of their investment into Wammel Group. In 2005, the Baileys transferred \$179,800.00 to Art Wammel for investment in his securities and index trading program. The funds reflected the entirety of the Baileys' 401(k) retirement funds as well as \$19,000.00 in cash they obtained from the sale of a vehicle. These funds were transferred to the Wammel Group, LLC when it was created in 2006. The Baileys transferred an additional \$200,000.00 to the Wammel Group in 2012. These funds came from a reverse mortgage on the Baileys' home. The transfers from the Wammel Group in the amount of \$377,315.00 reflect nothing more than a return of the Baileys' investment. *See* Sworn Declaration of Robert Bailey attached hereto as Exhibit 1.

**Arguments and Authorities**

The court should deny the Motion as there is a fact issue regarding the extent of the Baileys' investment into the Wammel Group. The Wammel Group was created by Art Wammel in 2006. Yet the Receiver and her experts limit their analysis of transfers to and from the Baileys to the time period of 2010 through 2017. However, evidence of the Bailey's relationship with the Wammel Group over its entire existence establishes that the Bailey's provided reasonably equivalent value for the transfers the Receiver seeks to avoid. As such, those transfers are not avoidable under Section 24.005 of the Texas Business & Commerce Code, nor do the transfers constitute unjust enrichment. As such, the court should deny the Motion.

**A. The Receiver's Claims Under Section 24.005(a)(1) and (a)(2) Fail as a Matter of Law Because the Bailey's Took The Transfers in Good Faith and Provided Reasonably Equivalent Value.**

The court should deny the Motion as there is a fact issue regarding whether the Baileys provided reasonably equivalent value for the transfers. In the Motion, the Receivers seeks summary judgment on her claims under Sections 24.005(a)(1) and (a)(2) of the Texas Business & Commerce Code. Section 24.005(a)(1) provides for the avoidance of a transfer if “the debtor made the transfer with actual intent to hinder, delay, or defraud any creditor of the debtor.” TEX. BUS. COMM. CODE. § 24.005(a)(1). However, Section 24.009 of the Texas Business & Commerce Code prohibits avoidance of such transfers “against a person who took in good faith and for a reasonably equivalent value...” TEX. BUS. COMM. CODE. § 24.009. Similarly, Section 24.005(a)(2), dealing with constructive fraud, applies only to transfers made “without receiving reasonably equivalent value”. TEX. BUS. COMM. CODE. § 24.005(a)(2).

The court must deny the Motion as the Baileys' summary judgment evidence establishes that they took the Transfers in good faith and for reasonably equivalent value. First, the Baileys took the Transfers in good faith. The Baileys were never aware that the Wammel Group was involved in the Ponzi scheme alleged by the Receiver. *See* Exhibit 1, ¶ 9. Instead, the Baileys believed that the Transfers were nothing more than part of their investment with the Wammel Group. *Id.* Moreover, the Baileys lacked any sophistication in the stock market that would have otherwise allowed them to determine the existence of the Ponzi scheme alleged by the Receiver. *Id.* at ¶ 3. Accordingly, even if the Transfers were part of a Ponzi scheme as alleged by the Receiver, the Baileys took the Transfers in good faith.

There is also a fact issue regarding whether the Baileys' provided reasonably equivalent value for the Transfers. In the Motion, the Receiver argues the Baileys' invested \$200,000.00

into the Wammel Group but received \$377,315.00 in transfers. The Receiver argues that the Baileys did not provide reasonably equivalent value for the difference, and thus that difference constitutes a fraudulent transfer.

The Receiver's argument is based on an artificially narrow time period. The Receiver's evidence establishes that she and her expert only reviewed transfers dating back to 2010. *See* Exhibit B to the Motion, p. 7, n. [a]. However, the Wammel Group was created by Art Wammel in 2006. *See* Exhibit 2. At that time, Art Wammel was in the possession of \$179,800.00 that the Baileys' invested with him personally. *See* Exhibit 1, ¶¶ 3-4. These funds were rolled into to the Wammel Group when it began operations in 2006. *Id* at ¶ 5. When the 2006 transfers from the Baileys to the Wammel Group are taken into account, the Baileys provided more than they received. Specifically, the Baileys provide \$379,800.00 when taking account of the 2006 transfer, but only received \$377,315.00. Thus there is a fact issue regarding whether the Baileys provided reasonably equivalent value for the Transfers. Accordingly, the court should deny the Motion.

**B. Fact Issues Regarding the Baileys' Initial Investment in the Wammel Group Preclude Summary Judgment on the Receiver's Unjust Enrichment Claim.**

In the Motion, the Receiver seeks summary judgment on her claim for unjust enrichment. As with her fraudulent transfer claims, the Receiver bases this claim on the perceived difference between the Bailey's initial investment into the Wammel Group and the payments the Baileys received from it. The Receiver's unjust enrichment claim must therefore fail for the same reason. The Baileys' summary judgment evidence establishes that they paid \$379,800.00 into the Wammel Group, but only received transfers in the amount of \$377,315.00. *See* Exhibit 1. As the Baileys received less than their original investment, they have not been unjustly enriched.

**C. A Constructive Trust Is Improper As the Receiver Has Failed to Establish Her Fraudulent Transfer and Unjust Enrichment Claim.**

In the Motion, the Receiver requests a constructive trust over the Baileys' assets as a remedy for her fraudulent transfer and unjust enrichment claims. As set forth herein, there are fact issues regarding the amount of the Baileys' investment into the Wammel Group, which preclude summary judgment on those claims. As the Receiver has failed to establish her claims as a matter of law, she has also failed to establish her right to a constructive trust. Accordingly, the court should deny the Motion.

**D. The Court Should Defer Considering the Motion Or Deny It Without Prejudice Until After the Conclusion of Arthur Wammel's Criminal Trial.**

The court should defer its consideration on the Motion until after the conclusion of Arthur Wammel's criminal trial set to begin on March 25, 2019. Federal Rule of Civil Procedure 56(d) provides that "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may defer consideration on the motion or deny it; or allow time to obtain affidavits or declarations or to take discovery." FED. R. CIV. P. 56(d). The court should enter such an order as the Baileys have been unable to obtain evidence necessary to respond to the Motion.

As of the filing of this Response, the Baileys have been unable to obtain affidavit testimony from Arthur Wammel regarding their transfers to the Wammel Group in 2006. The Baileys' counsel requested such testimony from Mr. Wammel's defense counsel. *See* Declaration of M. Kevin Powers attached hereto as Exhibit 3. Wammel's defense counsel indicated that Mr. Wammel could provide no testimony and would assert his Fifth Amendment rights until after the conclusion of his criminal trial. *Id.* Accordingly, the Baileys' have been unable to obtain Wammel's testimony which they believe will corroborate their testimony that they transferred funds to Wammel Group in 2006.

Wammel's testimony is necessary as it is the only corroborating evidence available. The Baileys have sought to obtain evidence of the 2006 transfers from their bank and the manager of Mr. Bailey's 401(k). However, neither maintain records back to 2006. *See* Exhibit 1, ¶ 8. Accordingly, Mr. Wammel's testimony is the only way for the Baileys' to corroborate that the 2006 transfer occurred. Accordingly, the Baileys' request that the court defer consideration of the Motion or deny it without prejudice until after the conclusion of Mr. Wammel's criminal trial.

**Prayer**

Based on the foregoing, Robert and Sandra Bailey respectfully requests that the court enter an order 1) denying the Receiver's Motion for Summary Judgment against Certain Winning Investors; and 2) granting them such other and further relief as they are justly entitled.

Respectfully submitted,

By: /s/ M. Kevin Powers  
M. Kevin Powers  
State Bar No. 24041715  
kevin@porterpowers.com

**PORTER & POWERS, PLLC**  
1776 Yorktown, Suite 300  
Houston, TX 77056  
(713) 621-0700 (tel)  
(713) 621-0709 (fax)

**COUNSEL FOR DEFENDANTS  
ROBERT AND SANDRA BAILEY**

**CERTIFICATE OF SERVICE**

A true and correct copy of the foregoing was served on all parties receiving notice via the court's ECF system, on March 13, 2019.

By: /s/ M. Kevin Powers  
M. Kevin Powers

**IN THE UNITED STATES DISTRICT COURT  
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**Ancillary Civil Action No. 4:18-cv-359**

**28 U.S.C § 1746 DECLARATION OF ROBERTY BAILEY**

1. My name is Robert Bailey. I am along with my wife Sandra are named “Winning Investor” Defendants in the above-referenced lawsuit. I am have never been convicted of a felony or crime of moral turpitude, and I am in all ways competent to make this Declaration.

2. In early 2005, I was a twenty-eight year employee of Shell Chemical working as an inside board operator at one of Shell’s chemical plants. In or about February 2005, I suffered a serious heart attack requiring surgery and an extensive recuperation. As a result, I took early retirement even though I was only fifty seven years old at the time.

3. As of the date of my retirement, I personally knew Arthur Wammel (“Wammel”). He was beginning an investment program in securities and index options. Wammel and I discussed his work, as he was looking for investors. Most of what we discussed was far too complicated for me as neither I nor Sandra have any experience in the stock market. As a result of these conversations, I withdrew all of the funds contained in my 401(k), and transferred them to Wammel for investment. These funds amounted to \$160,800.00.

4. Also in 2005, I sold a vehicle for \$19,000.00 in cash. I also provided these funds to Wammel for investment in his program.

5. In approximately 2006, Wammel created Wammel Group, LLC (“Wammel Group”). The \$179,800.00 that I previously invested with Wammel was rolled over into Wammel Group at the time. It is my understanding that Sandra and I are were two of the first investors in Wammel Group.

6. In 2012, Wammel and I discussed additional investment in Wammel Group. He indicated to me that adding additional funds to our current investment would present better investment opportunities. As a result, Sandra and I executed a reverse mortgage on our home in the amount of \$200,000.00. These funds were provided to Wammel Group for investment in its programs.

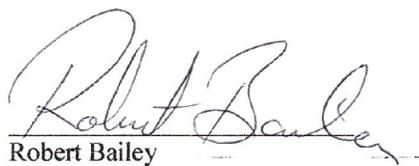
7. Taking into account our investments in 2006 and 2012, Sandra and I provided Wammel Group \$379,800.00.

8. I have sought records related to the withdrawal of \$177,000.00 from my 401(k) both from the manager of the 401(k) fund as well as my bank who received the funds prior to their transfer to Wammel. However, neither the fund manager nor the bank retain records back to 2005.

9. From 2012 through 2017, Sandra and I received \$377,315.00 from the Wammel Group as distributions from our investment. At the time of these transfers, neither Sandra nor I were aware of the existence of the Ponzi scheme that the Receiver has alleged was created by the Wammel Group. Both Sandra and I believed we were entitled to receive these transfers as part of our previous investment with the Wammel Group. In light of our prior investments, the receipt of these transfers did not appear unusual or to be anything other than what we would normally expect from investing our retirement.

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Executed on March 13, 2019.

  
Robert Bailey



Secretary of State  
P.O. Box 13697  
Austin, TX 78711-3697  
FAX: 512/463-5709

Filing Fee: \$300

Filed in the Office of the  
Secretary of State of Texas  
Filing #: 800710442 09/21/2006  
Document #: 145122270005  
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**Certificate of Formation  
Limited Liability Company**

**Article 1 - Entity Name and Type**

The filing entity being formed is a limited liability company. The name of the entity is:

**Wammel Group LLC**

The name of the entity must contain the words "Limited Liability Company" or "Limited Company," or an accepted abbreviation of such terms. The name must not be the same as, deceptively similar to or similar to that of an existing corporate, limited liability company, or limited partnership name on file with the secretary of state. A preliminary check for "name availability" is recommended.

**Article 2 – Registered Agent and Registered Office**

A. The initial registered agent is an organization (cannot be company named above) by the name of:

**National Registered Agents, Inc.**

OR

B. The initial registered agent is an individual resident of the state whose name is set forth below:

C. The business address of the registered agent and the registered office address is:

Street Address:

**1614 Sidney Baker Street Kerrville TX 78028**

**Article 3 - Governing Authority**

A. The limited liability company is to be managed by managers.

OR

B. The limited liability company will not have managers. Management of the company is reserved to the members.

The names and addresses of the governing persons are set forth below:

Managing Member 1: **Arthur F Wammel**

Title: **Managing Member**

Address: **1100 Nasa Parkway Suite 113 Houston TX, USA 77058**

**Article 4 - Purpose**

The purpose for which the company is organized is for the transaction of any and all lawful business for which limited liability companies may be organized under the Texas Business Organizations Code.

**Supplemental Provisions / Information**

[The attached addendum, if any, is incorporated herein by reference.]

**Organizer**

The name and address of the organizer are set forth below.

**Armine Ter-Vardanyan**      **7083 Hollywood Blvd., Suite 180, Los Angeles, CA 90028**

**Effectiveness of Filing**

A. This document becomes effective when the document is filed by the secretary of state.

**OR**

B. This document becomes effective at a later date, which is not more than ninety (90) days from the date of its signing. The delayed effective date is:

**Execution**

The undersigned signs this document subject to the penalties imposed by law for the submission of a materially false or fraudulent instrument.

**Armine Ter-Vardanyan**

Signature of Organizer

**FILING OFFICE COPY**

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**JENNIFER ECKLUND, RECEIVER**

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**Ancillary Civil Action No. 4:18-cv-359**

**28 U.S.C § 1746 DECLARATION OF M. KEVIN POWERS**

1. My name is Matthew Kevin Powers. I have never been convicted of a felony or crime of moral turpitude, and I am in all ways competent to make this Declaration.

2. I am the attorney of records for Robert and Sandra Bailey in the above-referenced lawsuit.

3. I have contacted Arthur Wammel’s defense counsel regarding providing affidavit testimony regarding transfers of funds Robert and Sandra Bailey made to him in 2005 and the subsequent transfer of those funds to Wammel Group, LLC in 2006. I was informed that Mr. Wammel had testimony that would be helpful to the Baileys in establishing their defense to the Receiver’s claims, but that Mr. Wammel would not testify prior to the conclusion of his criminal trial related to the same Ponzi scheme allegations made by the Receiver in this lawsuit.

4. Mr. Wammel’s counsel further indicated that Mr. Wammel would assert his Fifth Amendment right not to testify until the conclusion of his criminal trial. Based upon this representation, I did not seek to take the deposition of Mr. Wammel in this lawsuit.

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Executed on March 13, 2019.



M. Kevin Powers