

**United States Bankruptcy Court  
District of New Mexico**

**Document Verification**

**Case Title:** U.S. Trustee's Office, v. R. J. Schaefer Realty and Investment,, et al.  
**Case Number:** 96-01133  
**Nature of Suit:**  
**Judge Code:** S  
**Reference Number:** 96-01133 - S

Document Information			
<b>Number:</b>	50		
<b>Description:</b>	Memorandum Opinion on Cross Motions for Summary Judgment re: [45-1] Motion For Summary Judgment in its favor dismissing this adversary proceeding with prejudice by R. J. Schaefer Realty and Investment, In, [16-1] Motion For Partial Summary Judgment as to Count I of the Complaint by U.S. Trustee's Office .		
<b>Size:</b>	11 pages (25k)		
<b>Date Received:</b>	05/18/1999 03:37:13 PM	<b>Date Filed:</b>	05/18/1999
		<b>Date Entered On Docket:</b>	05/20/1999
Court Digital Signature			<a href="#">View History</a>
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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEW MEXICO

In re:

R.J. SCHAEFER and  
MARNA L. SCHAEFER,

Debtors.

No. 11-91-14134 RA

UNITED STATES TRUSTEE,

Plaintiff,

v.

Adv. No. 96-1133 R

R.J. SCHAEFER REALTY AND  
INVESTMENT, INC., EMPLOYEES  
PROFIT SHARING TRUST,

Defendant.

**MEMORANDUM OPINION ON CROSS  
MOTIONS FOR SUMMARY JUDGMENT**

This matter comes before the Court on cross-motions for summary judgment. The plaintiff, United States Trustee, is represented by its attorney Leonard Martinez-Metzgar. Defendant is represented by its attorney Richard M. Leverick. Plaintiff filed its motion for partial summary judgment as to Count 1 of the Complaint and a Memorandum in Support thereof on September 9, 1997. Defendant filed its Counter-motion for summary judgment on February 5, 1999 and a Memorandum in Opposition to Trustee's and in Support of Counter-Motion for Summary Judgment on the same day.<sup>1</sup> Having reviewed the pleadings and supporting materials,

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<sup>1</sup>The Court had dismissed this adversary proceeding on August 29, 1997, and the motion for summary judgment was filed after the

and being otherwise fully advised, the Court finds that Plaintiff's motion is well taken and should be granted, and that Defendant's motion is not well taken and should be denied. This is a core proceeding under 28 U.S.C. §157(b)(2)(B). This Memorandum Opinion constitutes the Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052.

**STANDARD FOR SUMMARY JUDGMENT**

Summary judgment is governed by Bankruptcy Rule 7056, which adopts Federal Rule of Civil Procedure 56. Section (c) provides:

Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

In applying this standard, the Court examines the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. Diamond Bar Cattle Company v. United States, 168 F3d. 1209, 1999WL88945, 2 (10<sup>th</sup> Cir. 1999) (citing Sundance Assocs., Inc. v. Reno, 139 F.3d 804, 807 (10<sup>th</sup> Cir. 1998)).

**NATURE OF THIS CASE**

This adversary proceeding was filed by the United States

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case was dismissed, but while a motion for reconsideration was pending. The United States District Court for the District of New Mexico reversed the dismissal on November 5, 1998. On January 8, 1999 this Court fixed a deadline for defendant to file its response to the motion. Defendant timely filed its response.

Trustee to subordinate under 11 U.S.C. §510(b) various proofs of claim filed by limited partners of limited partnerships related to the debtors. These proofs of claim were assigned to the R.J. Schaefer Realty and Investment, Inc. Employees Profit Sharing Trust as part of a settlement of both a 1992 state court case and an adversary proceeding brought by the debtors against various parties and their attorneys.

### **LEGAL ISSUES**

Section 510(b) of the Bankruptcy Code states:

For the purpose of distribution under this title, a claim arising from rescission of a purchase or sale of a security of the debtor or of an affiliate of the debtor, for damages arising from the purchase or sale of such a security, or for reimbursement or contribution allowed under section 502 on account of such a claim, shall be subordinated to all claims or interests that are senior to or equal the claim or interest represented by such security, except that if such security is common stock, the claim has the same priority as common stock.

Both plaintiff and defendant cite the case of In re Amarex, 78 B.R. 605 (W.D. Ok. 1987) as the applicable standard for interpreting section 510(b) of the code. That case differentiates claims relating to or based upon alleged violations of the securities laws (and which arise from the purchase and sale of those securities) from other claims such as mismanagement, continuing concealment of information, or fraud (and arising after the security was purchased). Id. at 609. It rejected the "but for" test applied by the bankruptcy court,

which subordinated all claims of the holders because the claimants "would have no claims against the debtor but for their purchase of the securities, and had the purchase not occurred they would not have the pendant common law claims." Id. at 608. Therefore, the rule of law is that a claim arising from the purchase or sale of a security is to be subordinated; other claims, such as "fraud in the retention" claims, see Robert J. Stark, *Reexamining the Subordination of Investor Fraud Claims in Bankruptcy*, 72 Am. Bankr. L.J. 497, 498 (Fall 1998), are not properly subordinated.

#### **DISCUSSION**

The obvious starting point for the Court's analysis is the proofs of claim. Appendix A to this memorandum is a detailed list of the relevant proofs of claim. Of these twenty-five claims, twenty-three provide no documentation of the claim other than the attachment of either one or more limited partnership subscription agreements or canceled checks that denote "purchase of [number] shares of [name of] partnership". None make a claim for anything other than the investment in the partnership(s). All state as a basis for the claim "goods sold". Claim 45 attaches canceled checks, but there is no notation on those checks that clarifies the nature of the debt, or, actually, even the existence of a debt. Claim 49 attaches no documentation

whatsoever.<sup>2</sup>

Bankruptcy Rule 3001(f) states an evidentiary rule: A proof of claim executed and filed in accordance with the rules shall constitute prima facie evidence of the validity and amount of the claim. See e.g. Agricredit Corporation v. Harrison, 987 F.2d 677, 680 (10<sup>th</sup> Cir. 1993). Furthermore, a "proof of claim is the creditor's statement as to the amount and character of the claim." Id. citing In re Padget, 119 B.R. 793, 797 (Bankr. D. Co. 1990)(emphasis added). Applying this rule, the Court must find that the twenty-three claims are based solely on the purchase of limited partnership interests.

Plaintiff's motion is very straightforward. It argues 1) claims 40 through 64 are damage claims related to the purchase of securities from the debtors or debtors' affiliate, 2) section 510(b) requires subordination, and 3) judgment should be entered as a matter of law.

The majority of defendant's response to the motion for summary judgment focuses on the nature of the state court lawsuit filed in August, 1992 and its settlement. In that case various limited partners filed suit alleging actions or inactions of various parties both before and after the sale of the limited partnership interests, including negligent representation relating to the sale of the partnership interests, dissemination

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<sup>2</sup>Both of these claims are objectionable; neither provide any documentation that supports the claims made.

of a continuing flow of false information after the purchases, preparation of misleading and false financial statements to induce the plaintiffs to continue making capital contributions, mismanagement of the various limited partnerships, etc.

First, defendant argues that in the state court case any claims relating to the purchase or sale of a security were barred by the applicable statute of limitations.<sup>3</sup> It supports this argument with the affidavit of Robert J. Schaeffer ("affidavit") that lists when various interests were purchased and steps the purchasers could or should have taken to discover the alleged fraud or securities law violation within two years. Presumably, defendant's argument is that if there is no state law remedy relating to the purchase of securities, there can be no subordination under §510(b). The Court does not need to examine the affidavit to ascertain dates of purchase, or make a ruling on the statute of limitations issue, because the Court finds that the existence of a state law remedy is irrelevant to an action under 510(b). Section 510(b) on its face does not limit itself to claims that could be brought in other courts, rather it limits itself to "claim[s] arising from rescission of a purchase or sale of a security, ... for damages arising from the purchase or sale ... or for reimbursement ... on account of such a claim". The

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<sup>3</sup>Defendant does not actually say that this affirmative defense was decided in that case, nor does it attach any pleadings that rule on the defense.

Court refuses to write into the statute a requirement that the claim also be actionable elsewhere. Alternatively, if the affidavit is setting forth dates for the purpose of implying there is a statute of limitations problem in the 510(b) action, the Court finds no limitation in the text of 510(b) or elsewhere in the Bankruptcy Code. Compare e.g. 11 U.S.C. 546(a) (specific time limitations set out for commencement of actions under sections 544, 545, 547, 548 and 553).

Next, defendant argues that the settlement reached in the lawsuit concerned primarily the actions of third parties that took place after the sale of the partnership interests to the plaintiffs. The affidavit states:

Based on my knowledge of the Lawsuit and the attached pleadings, plus my participation in the settlement reached in the Lawsuit, it is clear to me that a settlement was reached on matters that occurred after the sale of securities to the Plaintiffs; matters that did not deal directly with the sale or purchase of securities but instead dealt with the operation of the relevant partnerships.

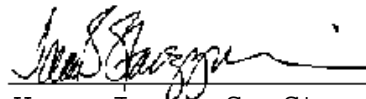
Presumably defendant's argument is that because the settlement in the lawsuit focused on something other than the original sale of the securities, the proofs of claim should somehow be deemed to be amended to instead make a claim for what eventually was settled. The Court cannot do this. See *Agricredit*, 987 F.2d at 680 (Bankruptcy Court properly treats claim "on its face" absent amendment or supplementation.) The face of each proof of claim indicates that it is based on the sale of a security. The Court



is further reluctant to deem the claims amended because, as the affidavit itself states, the settlement reached "primarily" involved the actions of third parties. All this statement does is bolster the fact that the only claim against the debtors was the original claim "arising from" the sale of a security.

Finally, defendant argues that the funds in the estate are the direct result of Robert J. Schaefer expending time and legal and accounting fees to recover funds from the Internal Revenue Service, and that therefore defendant (a related party) is not properly subordinated under section 510(c), as requested in Count 2 of the complaint. Because the Court finds that the claims should be subordinated under section 510(b), this argument does not need to be addressed and Defendant's Motion for Summary Judgment as to Count 2 is denied as moot.

Therefore, for the reasons set forth above in this Memorandum Opinion the Court will enter orders 1) granting Plaintiff's Motion for Summary Judgment, except as it relates to Proofs of Claim 45 and 49, and 2) denying Defendant's Motion for Summary Judgment on Count 1, and denying Defendant's Motion for Summary Judgment on Count 2 as moot.

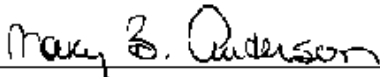


Hon. James S. Starzynski  
United States Bankruptcy Judge

I hereby certify that, on the date file stamped above, a true and correct copy of the foregoing was either electronically transmitted, faxed, mailed, or delivered to:

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Mr. Leonard Martinez-Metzgar  
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PO Box 608  
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Mary B. Anderson

**APPENDIX A - CLAIMS RELATED TO THIS ADVERSARY PROCEEDING**

Every claim, numbers 40 through 64, list as the basis for the claim "goods sold."

<b>CLAIM</b>	<b>CLAIMANT</b>	<b>AMOUNT</b>	<b>NATURE OF CLAIM</b>
40	L. Potter	\$ 8,000.00	Purchase of limited partnership interest
41	D. & D. Rice	52,511.44	Purchase of limited partnership interest
42	M. & B. Smith	8,190.00	Purchase of limited partnership interest
43	M. Ellis	29,250.00	Purchase of limited partnership interest
44	L. & P. Spillman	5,300.00	Purchase of limited partnership interest
45	H. Yee	7,865.00	Unclear from proof of claim
46	D. Zwilling	101,065.00	Purchase of limited partnership interest
47	R. & C. Dau	34,200.00	Purchase of limited partnership interest
48	J. Danzer	20,000.00	Purchase of limited partnership interest
49	S. & R. Brock	8,330.00	No documentation attached
50	C. Brown	47,460.00	Purchase of limited partnership interest
51	J. Benvenuti	14,260.00	Purchase of limited partnership interest
52	C. & M. Evjen	35,100.00	Purchase of limited partnership interest
53	R. Forer	11,820.00	Purchase of limited partnership interest
54	L. Flores	20,300.00	Purchase of limited partnership interest
55	L. Harlow	18,520.00	Purchase of limited partnership interest

<b>CLAIM</b>	<b>CLAIMANT</b>	<b>AMOUNT</b>	<b>NATURE OF CLAIM</b>
56	M. Hyde	5,550.00	Purchase of limited partnership interest
57	R. Jackson	16,960.00	Purchase of limited partnership interest
58	H. & J. Kimberly	5,300.00	Purchase of limited partnership interest
59	W. Korovlev	8,075.00	Purchase of limited partnership interest
60	G. Lowrance II	11,700.00	Purchase of limited partnership interest
61	K. Davis	6,745.00	Purchase of limited partnership interest
62	J. & D. Harlow	11,820.00	Purchase of limited partnership interest
63	R. Evans	5,692.00	Purchase of limited partnership interest
64	G. Charter	6,745.00	Purchase of limited partnership interest