

STATE OF OKLAHOMA
IN THE DISTRICT COURT OF LOGAN COUNTY
STATE OF OKLAHOMA

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LOGAN COUNTY SS:
FILED FOR RECORD ON
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RAJAMONIA ENICK
CLERK

BY _____ DEPUTY

Oklahoma Department of Securities)
ex rel. Irving L. Faught,)
Administrator,)

Plaintiff,)

v.)

Case No. *9-2004-256*

Marsha Schubert, an individual and)
dba Schubert and Associates;)
Richard L. Schubert, an individual and)
dba Schubert and Associates; and)
Schubert and Associates,)
an unincorporated association,)

Defendants.)

APPLICATION FOR TEMPORARY RESTRAINING ORDER,
ORDER FREEZING ASSETS, ORDER APPOINTING RECEIVER,
AND ORDER FOR ACCOUNTING

The Oklahoma Department of Securities *ex rel.* Irving L. Faught, Administrator ("Department"), respectfully submits this application for a temporary restraining order against Defendants Schubert and Associates, Richard Schubert, and Marsha Schubert (collectively, "Defendants"), an order freezing assets of Defendants, an order appointing a receiver for Defendants, and an order for an accounting by Defendants, pursuant to Section 1-603 of the Oklahoma Uniform Securities Act of 2004 ("Act"). This case concerns violations of the Act and the Oklahoma Securities Act ("Predecessor Act"), Okla. Stat. tit. 71, §§ 1-413, 501, 701-703 (1991 & Supp. 2003).

The Department petitions this Court to halt further violations of the Act, to protect the rights of the Department in its obligation to safeguard the public interest, to prevent any

dissipation or loss of investor funds and property, and to remedy actions that Defendants have already committed.

The Department moves this Court to issue *instantly* a temporary restraining order, an order freezing assets, an order appointing receiver, and an order for an accounting by Defendants until the Court may afford the parties a hearing, and additionally moves for the entry of a temporary injunction at such hearing against Defendants. The entry of such orders are necessary for the reasons set forth below, to preserve the *status quo* and to protect the Department's rights in enforcing the Act.

I. THE DEFENDANTS

Marsha Schubert is an individual and an Oklahoma resident. At all times material hereto, Marsha Schubert offered and/or sold securities in and/or from Oklahoma as described herein in her own name and/or in the name of Schubert and Associates.

Richard Schubert is an individual and an Oklahoma resident. At all times material hereto, Richard Schubert offered and/or sold securities in and/or from Oklahoma as described herein in his own name and/or in the name of Schubert and Associates.

Schubert and Associates is an unincorporated association, purporting to operate as an investment program, with its principal place of business in Crescent, Oklahoma. At all times material hereto, Schubert and Associates issued, offered, and/or sold securities in and/or from Oklahoma as described herein. At all times material hereto, Schubert and Associates acted under the control of Marsha Schubert and/or Richard Schubert.

II. NATURE OF THE CASE

Beginning in or about 2001, and continuing to the present, Defendants engaged in the issuance, offer, and/or sale of securities in and/or from Oklahoma to investors ("Investors") in

the nature of interests in an investment program ("Investment Program Interests") in which Defendants represented they would pool and invest Investor funds returning large profits to Investors. Defendants have solicited and are soliciting Investors to invest money in the Investment Program. Defendants' representations were made through the use of oral communications.

To purchase Investment Program Interests, Investors were directed to make their checks payable to Schubert and Associates. Defendants then deposited Investor funds into a bank account in the name of Schubert and Associates. Defendants did not disclose to Investors how Defendants would invest Investors' money, but generally stated that the money would be used to make trades in option contracts. Defendants promised that the Investment Program Interests are "full proof" and promised profits of thirty percent (30%) annual interest. Investors had no role in the success or outcome of the investments or in affecting the promised profit in the Investment Program. Investors relied completely on the judgment and discretion of the Defendants for the promised profit.

Defendants rarely provided statements to Investors documenting their investments in the Investment Program Interests. Some Investors received a computer produced statement in January of 2004 reflecting the amount or value of their investment at that time. Some Investors also received handwritten statements from time to time on request. However, in most cases, Investors who inquired about their profits merely received a handwritten note reflecting the percentage of profit Defendants claimed the Investors were making. When Investors asked to see the Schubert and Associate investment records, Defendants told Investors that the records were at the Schubert residence.

At all times material hereto, Marsha Schubert was registered as an agent of a broker-dealer registered to engage in the securities business in the state of Oklahoma. Marsha Schubert held herself out as competent to transact securities trades on behalf of customers and that because of her registered status she would deal fairly with her customers in accordance with the standards of the securities profession. The Investors placed trust and confidence in Marsha Schubert to act for their benefit. She lured the Investors into thinking that the Investment Program was part of a legitimate brokerage investment. However, the offer and sale of the Investment Program Interests involved securities transactions outside the regular course or scope of her employment with a registered broker-dealer, and were therefore, outside the scope of her agent registration.

In addition to investing in the Investment Program Interests, the Investors were brokerage customers of Marsha Schubert and her affiliated broker-dealers. The Investors did receive statements from the broker-dealers reflecting the securities held in their brokerage accounts. Some Investors believed their money had been placed in their brokerage accounts and questioned Marsha Schubert about why the account value depicted on their brokerage statements did not match the amount they believed they had invested with Defendants. Marsha Schubert told Investors she had resigned from one brokerage firm and became affiliated with a different firm because of problems with the account statements and that the statements from the new brokerage firm should be accurate.

In May of 2004, Marsha Schubert was permitted to resign while under investigation by the broker-dealer with whom she was registered. In April of 2004, the broker-dealer had conducted an audit on Marsha Schubert regarding wire fund activity involving her customers' brokerage accounts and deposits from Schubert and Associates. When Marsha Schubert's

customers, who had check writing authority on their brokerage accounts, wrote checks exceeding their cash availability for withdrawal, Marsha Schubert would be notified by the brokerage firm that her customer had insufficient funds. Marsha Schubert would then make a deposit in the form of a wire transfer from Schubert and Associates to cover the deficiency. This practice continued after Marsha Schubert became affiliated with the second brokerage firm. Phone logs retrieved from Marsha Schubert's office support that customers called to notify Ms. Schubert when they were writing checks. Ms. Schubert would deposit funds from Schubert and Associates to cover any checks drawn in that customer's brokerage account.

In October of 2004, the Department conducted an examination of Marsha Schubert's broker-dealer office. Marsha Schubert claimed that Schubert and Associates is a limited partnership managed by her husband Richard Schubert. She stated that Richard Schubert is the general partner and that the limited partners are just a small group of his friends who wanted to form an investment club. Marsha Schubert asserted that she is not acting as a representative of Schubert and Associates. Marsha Schubert stated there were no records for Schubert and Associates in her office. Marsha Schubert refused to produce documents and has since closed the business without notice or explanation to Investors and advised employees that their employment was terminated.

The Investment Program Interests are not registered as securities with the Department. Martha Schubert and Richard Schubert are not registered as issuer agents with the Department.

III. VIOLATIONS OF THE OKLAHOMA SECURITIES ACT

A. Violation of Section 1-301 of the Act and Section 301 of the Predecessor Act: Failure to Register Securities

The Investment Program Interests are securities as defined by Section 1-102 of the Act and Section 2 of the Predecessor Act.

The securities offered and sold by Defendants are not and have not been registered, or otherwise qualify for, an exemption from registration pursuant to Section 1-201 of the Act or Section 401 of the Predecessor Act.

By reason of the foregoing, Defendants have violated Section 301 of the Predecessor Act and have violated, are violating, and unless enjoined, will continue to violate Section 1-301 of the Act.

**B. Violation of Section 1-401(A) of the Act and Section 201 of the Predecessor Act:
Failure to Register as Agents and Employing Unregistered Agents**

Defendants are not registered under the Act as issuer agents under Section 1-401(A) of the Act.

Schubert and Associates is an issuer as defined in Section 1-401 of the Act and Section 2 of the Predecessor Act.

Marsha Schubert and Richard Schubert, by virtue of their efforts and activities in this state in effecting or attempting to effect transactions in securities, are issuer agents, as defined in Section 1-102 of the Act and Section 2 of the Predecessor Act. Marsha Schubert and Richard Schubert have transacted and are transacting business in this state as issuer agents without benefit of registration under the Act or the Predecessor Act.

Schubert and Associates employed unregistered agents.

By reason of the foregoing, the Defendants have violated Section 201 of the Predecessor Act and have violated, are violating, and unless enjoined, will continue to violate Section 1-401 of the Act.

**C. Violation of Section 1-501 of the Act and Section 101 of the Predecessor Act:
Untrue Statements of Material Fact and Omissions of Material Fact
in Connection with the Offer, Sale or Purchase of Securities**

Defendants, in connection with the offer, sale, or purchase of securities, directly and indirectly, made and are making untrue statements of material facts including, but not limited to, that the Investment Program would provide guaranteed profits or returns in the nature of annual interest of thirty percent (30%) or greater.

Defendants, in connection with the offer, sale, or purchase of securities, directly and indirectly, omitted and are omitting to state material facts necessary in order to make the statements made, in light of the circumstances under which they were and are made, not misleading, including, but not limited to, the following matters:

- a. any general or specific risk factors associated with the Investment Program Interests;
- b. that the Investment Program Interests are securities under the Act and the Predecessor Act;
- c. that the securities have not been and are not registered under the Act or the Predecessor Act;
- d. that the Investment Program Interests were not being offered and sold through a registered broker-dealer;
- e. that the Defendants were not registered to offer and sell securities under the Act or the Predecessor Act;
- f. that Schubert and Associates was not affiliated with the customers' brokerage accounts;
- g. that the Investment Program Interests were not an authorized product of Marsha Schubert's broker-dealer; and
- h. information on the manner in which profits would be generated on the Investment Program Interests or Investors' funds would be disposed.

By reason of the foregoing, Defendants, directly and indirectly, have violated Section 101 of the Predecessor Act, and have violated, are violating, and unless enjoined, will continue to violate Section 1-501 of the Act.

**D. Violation of Section 1-501 of the Act and Section 101 of the Predecessor Act:
Engaging in any Act, Practice, or Course of Business that Operates
or Would Operate as a Fraud or Deceit upon any Person**

Defendants, in connection with the offer, sale, or purchase of securities, and through the use of the untrue statements of material fact and the omissions of material facts described above, have engaged and are engaging in an act, practice, or course of business that has operated and continues to operate as a fraud or deceit upon investors.

By reason of the foregoing, Defendants, directly and indirectly, have violated Section 101 of the Predecessor Act, and have violated, are violating, and unless enjoined, will continue to violate Section 1-501 of the Act.

**IV. NEED FOR TEMPORARY RESTRAINING ORDER, ASSET FREEZE,
APPOINTMENT OF A RECEIVER, ACCOUNTING
AND TEMPORARY INJUNCTION**

A. Temporary Restraining Order

Section 1-603 of the Act provides in part:

- (A) If the Administrator believes that a person has engaged, is engaging, or is about to engage in an act, practice, or course of business constituting a violation of this act or a rule adopted or order issued under this act or constituting a dishonest or unethical practice or that a person has, is, or is about to engage in an act, practice, or course of business that materially aids a violation of this act or a rule adopted or order issued under this act or a dishonest or unethical practice, the Administrator may, prior to, concurrently with, or subsequent to an administrative proceeding, maintain an action in the district court of Oklahoma County or the district court of any other county where service can be obtained to enjoin the act, practice, or course of business and to enforce

compliance with this act or a rule adopted or order issued under this act.

(B) In an action under this section and on a proper showing, the court may:

1. Issue a permanent or temporary injunction, restraining order, or declaratory judgment;

2. Order other appropriate or ancillary relief, which may include:

a. an asset freeze, accounting, writ of attachment, writ of general or specific execution, and appointment of a receiver or conservator, that may be the Administrator, for the defendant or the defendant's assets,

b. ordering the Administrator to take charge and control of a defendant's property, including investment accounts and accounts in a depository institution, rents, and profits; to collect debts; and to acquire and dispose of property,

c. imposing a civil penalty up to a maximum of Five Thousand Dollars (\$5,000.00) for a single violation or up to Two Hundred Fifty Thousand Dollars (\$250,000.00) for more than one violation; an order of rescission, restitution, or disgorgement directed to a person that has engaged in an act, practice, or course of business constituting a violation of this act or the predecessor act or a rule adopted or order issued under this act or the predecessor act, and

d. ordering the payment of prejudgment and postjudgment interest; or

3. Order such other relief as the court considers appropriate.

Section 406.1 of the Act provides in part:

(a) Upon a showing by the Administrator that a person has violated or is about to violate the Oklahoma Securities Act, except under the provisions of Section 202.1 or 305.2 of this title, or a rule or order of the Administrator under the Oklahoma Securities Act or that a person has engaged or is about to engage in dishonest or unethical practices in the securities business, the Administrator, prior to, concurrently with, or subsequent to an administrative proceeding, may bring an action in the district court of Oklahoma County or the district court of any other county

where service can be obtained on one or more of the defendants and the district court may grant or impose one or more of the following appropriate legal or equitable remedies:

- (1) Upon a showing of a violation of the Oklahoma Securities Act or a rule or order of the Administrator under the Oklahoma Securities Act or conduct involving dishonest or unethical practices in the securities business:
 - (i) a temporary restraining order, permanent or temporary prohibitory or mandatory injunction, or a writ of prohibition or mandamus;
 - (ii) a civil penalty up to a maximum of Five Thousand Dollars (\$5,000.00) for a single violation or of Fifty Thousand (\$50,000.00) for multiple violations in a single proceeding or a series of related proceedings;
 - (iii) a declaratory judgment;
 - (iv) restitution to investors;
 - (v) the appointment of a receiver or conservator for the defendant or the defendant's assets, and
 - (vi) other relief the court deems just (*emphasis added*).

The authority to grant or deny an injunction as an equitable remedy is governed by principles of equity. *Wichita Wire, Inc. v. Lenox*, 11 Kan. App. 2d 459, 461 (1986). The purpose of a temporary injunction is to prevent injury to a claimed right pending a final determination of the controversy on its merits. *Id.* A temporary injunction merely preserves the status quo until a final determination of a controversy can be made. Title 12 O.S.1981 § 1382 authorizes a district court to issue temporary injunctions and restraining orders to achieve

precisely that outcome. *Westinghouse Electric Corporation v. Grand River Dam Authority*, 720 P.2d 713 OK (1986).

Defendants have engaged in acts and practices in violation of the Act and the Predecessor Act and have, as a result of these activities, received a substantial amount of money from numerous Investors. It is unknown how the Defendants may handle the brokerage and bank accounts if the funds are not preserved. Therefore, issuing a temporary restraining order is in the public interest and the Department must safeguard the public interest.

B. Asset Freeze and Accounting

Section 1-603 of the Act and Section 406.1 of the Predecessor Act specifically grant this Court the power to issue appropriate equitable relief to provide effective enforcement of the Act and the Predecessor Act. Once the equity powers of the court are invoked, the court possesses the power to fashion appropriate interim remedies. *SEC v. Manor Nursing Centers*, 458 F. 2d 1082, 1103 (2nd Cir. 1972). Within this power is the authority to grant effective equitable relief by temporarily freezing specific assets. *SEC v. General Refractories Co.*, 400 F.Supp. 1248, 1259 (D.D.C. 1975); *SEC v. International Swiss Investments Corp.*, 895 F.2d 1272, 1276 (9th Cir. 1990); *SEC v. Manor Nursing Centers*, 458 F.2d at 1105-06 (upholding district court's order freezing assets in part because "...at the time the court's order was entered, a great deal of uncertainty existed with respect to the total amount of proceeds received and their location.") Within the equity power of the court is the authority to order an accounting by the Defendants. *SEC v. R.J. Allen & Associates*, 386 F. Supp. 866, 880 (S.D.N.Y. 1974); *SEC v. Manor Nursing Centers*, *supra* at 1103-1104.

Defendants made use of untrue statements of material fact and omitted to state material facts as alleged in Plaintiff's verified petition, in violation of Section 1-501 of the Act and

Section 101 of the Predecessor Act. The whereabouts of the money raised by Defendants through violations of the Act and the Predecessor Act is not known at this time. These circumstances make it necessary that the court freeze specific assets to preserve the status quo by preventing the dissipation of assets and to account for the money raised through violations of the Act and the Predecessor Act so as to protect Investors and to provide effective relief.

C. Appointment of a Receiver

The violations of the Act and the Predecessor Act, as described above, give the Department the right to seek one or more of the remedies available by statute and in equity. *Oklahoma Securities Commission v. CFR International, Inc.*, 622 P.2d 293,295 (Okla. Ct. App. 1980). One such remedy is that of the appointment of a receiver. In *SEC v. American Bd. Of Trade, Inc.*, 830 F.2d 431 (2d Cir. 1987), the court, quoting *SEC v. Manor Nursing Centers, Inc.* 458 F.2d 1082, 1105 (2d. Cir, 1972), stated that the primary purpose of the appointment of a receiver is to help "preserve the status quo while the various transactions were unraveled" so that an accurate picture of what happened could be formulated. *Id.* at 436.

In circumstances of egregious fraud where the interests of public investors are in substantial jeopardy, it has been recognized that the appointment of a receiver is necessary to prevent "diversion or waste of assets to the detriment of those for whose benefit, in some measure, the injunction action is brought." *Securities and Exchange Commission v. Capital Counselors, Inc.*, 332 F. Supp. 291, 304 (S.D. N.Y. 1971). The form and quantum of evidence required is a matter of judicial discretion. *U.S. v. O'Connor*, 291 F.2d 520 (2d Cir. 1961); *Haase v. Chapman*, 308 F.Supp. 399 (W.D.Mo. 1969). Here, the evidence is admissible and compelling that Defendants have engaged in a fraudulent course of business to induce the public to purchase unregistered securities. It is critical that a receiver be appointed to prevent further dissipation of

Investor assets and to prevent continued violations of the law. There is no definitive list of facts by which the Court must abide; however, the Sixth Circuit in *Tennessee Pub. Co. v. Carpenter*, 100 F.2d 728, 732 (6th Cir. 1938), identified factors which can be considered, each of which is applicable here and justify the appointment of a receiver for the Defendants:

“Factors typically influencing the district court’s exercise of discretion include the existence of a valid claim by the moving party; the probability that fraudulent conduct has occurred or will occur to frustrate the claim; imminent danger that property will be lost, concealed, or diminished in value; inadequacy of legal remedies; lack of a less drastic equitable remedy; and the likelihood that appointment of a receiver will do more harm than good.”

D. Temporary Injunction

Once the Plaintiff has shown the Defendants’ past conduct is in violation of the Act and/or the Predecessor Act, the proper test for the issuance of a statutory injunction is whether there is a reasonable expectation of future violations by Defendants. *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082 (2d Cir. 1975); *SEC v. Culpepper*, 270 F.2d 241, 249 (2d Cir. 1959). In considering this issue, past illegal conduct is strong support for the likelihood of future violations. *Oklahoma Securities Commission v. CFR International, Inc.*, *supra*. Here, the Defendants have violated the Act and the Predecessor Act which creates a presumption of likelihood of future violations. Because the Plaintiff has conclusively demonstrated the existence of past violations, injunctive relief is appropriate and the burden of showing there is no reasonable expectation of future violations will shift to the Defendants and their burden “is a heavy one.” *SEC v. Culpepper*, 270 F.2d 241, 249 (2d Cir. 1959); *Oklahoma Securities Commission v. CFR International, Inc.*, 622 P.2d 293, 295 (Okla. Ct. App. 1980).

Unlike private actions for injunctions, the Department’s action is based on statute and no showing of irreparable injury or the inadequacy of other remedies is required. *Oklahoma Securities Commission v. CFR International, Inc.*, 622 P.2d 293, 295 (Okla. Ct. App. 1980)

(citing *Bradford v. SEC*, 278 F.2d 566 (9th Cir. 1960)). Although not required, the Department has also shown that the public will suffer irreparable injury if Defendants are not enjoined from further violations of the Act.

E. An Ex Parte Order Should be Issued

While courts have been cautious with the use of *ex parte* orders, they are approved in appropriate cases. *Covington, Knox Inc. v. Texas*, 577 S.W. 2d 323 (Tex. App. Houston [14th Dist.] 1979, no writ). The Department alleges facts that demonstrate a strong likelihood of ongoing violations of the Act by Defendants.

In addition, there is a great risk that Defendants will take measures to dissipate assets if provided notice of this action before a temporary restraining order is issued and a receiver is appointed. Providing notice of this action to Defendants could lead to loss of Investor funds, and consequently cause irreparable injury to the Department's ability to safeguard the public interest by providing monetary redress and by preventing irreparable loss and injury to potential Investors. The issuance of a temporary restraining order *instanter*, an asset freeze, the appointment of a receiver *pendente lite*, and an order for an accounting by the Defendants will help maximize the relief to Investors and protection of the public interest.

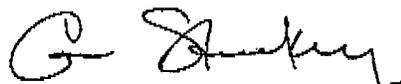
V. Conclusion

The Department, pursuant to Section 1-602 of the Act, conducted an investigation into Defendants' activities in and/or from Oklahoma. The investigation produced evidence that clearly indicates Defendants issued, offered and/or sold unregistered securities, acted as unregistered agents, and/or employed unregistered agents. The investigation also revealed that Defendants, in connection with the offer, sale, and/or purchase of securities: (1) made and are making untrue statements of material fact; (2) omitted and are omitting to state certain material

facts; and (3) engaged and are engaging in a course of business which has operated as a fraud or deceit upon Investors. Defendants have engaged in substantial violations of the Predecessor Act and have engaged in and are engaging in substantial violations of the Act, including fraudulent practices. The Department submits that the evidence firmly establishes a *prima facie* case for the issuance of a temporary restraining order, an asset freeze, the appointment of a receiver, an accounting, and a temporary injunction.

In light of the facts presented and the authorities cited, the Department respectfully requests that this Court issue a temporary restraining order, an order freezing the assets of Defendants, an order appointing a receiver for Defendants, and an order for an accounting, until such time as the Court may afford the parties a hearing on the Plaintiff's motion for temporary injunction, all to halt Defendants' unlawful practices and to provide effective relief to Investors and to the Department.

Respectfully submitted,



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CERTIFICATE OF MAILING

The undersigned certifies that on the 14th day of October, 2004, a true and correct copy of the foregoing was mailed via First Class Mail, postage prepaid, to the following:

Mack Martin
Martin Law Office
119 N Robinson, Suite 360
Oklahoma City, OK 73102

The undersigned certifies that on the 14th day of October, 2004, a true and correct copy of the foregoing was mailed via certified mail, postage prepaid, to the following:

Marsha Schubert
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c/o Marsha Schubert
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Brenda London Smith