

IN THE DISTRICT COURT OF LOGAN COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA
LOGAN COUNTY SS
FILED FOR RECORD

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REJEANIA ZMEK
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Oklahoma Department of Securities)
ex rel. Irving L. Faught,)
Administrator,)
)
Plaintiff,)
)
v.)
)
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.)

Case No. CJ 2004-256

**PLAINTIFF'S OBJECTION TO DISTRIBUTION AMOUNTS IN RECEIVER'S PLAN
OF DISTRIBUTION AND REQUEST TO EQUALIZE RECOVERY**

Plaintiff, the Oklahoma Department of Securities *ex rel.* Irving L. Faught, Administrator (Department), responds herein to the *Application of Receiver for Approval of Recommendations and/or Rejection of Claims and Authorization for Distribution*, filed by Receiver, Douglas L. Jackson, (Receiver). The Department respectfully requests that the Court take steps to equalize the actual recovery to claimants by deducting third party recoveries from the approved receivership claims before any distribution is made.

The Department filed this case against Marsha Schubert and Schubert and Associates (Schubert) for violations of the Oklahoma securities laws. This Court permanently enjoined Schubert from selling securities and appointed the Receiver "to act for the benefit of the investors and creditors of the Enforcement Action Defendants; to institute actions to recover assets, to include assets directly traceable to the Enforcement Action Defendants' fraudulent

investment scheme; and to promote equity among the investors in the Schubert and Associates investment program.”

Schubert conducted a “Ponzi” scheme wherein she made payments to participants, purportedly generated from investment activities, when in actuality the source of such payments was other participants. Many participants suffered net investment losses and are therefore claimants against the receivership estate.

THE DISTRIBUTION PROCESS

This Court established a claims process. The Receiver has investigated the claims and submitted to this Court his recommendations for allowance and/or rejection of proofs of claim. The Receiver is now proposing to make a distribution that will result in an approximately 17% return to the claimants with allowed claims¹.

Some of the claimants have brought lawsuits or arbitration claims against third parties such as the brokerage firms with whom Schubert was affiliated or banks that may have enabled her scheme. Some of the third party actions have been settled, some are ongoing, and some may be initiated in the future. As a result, the Department has reason to believe that certain of the claimants could potentially receive a double recovery by their participation in the distribution(s) from the receivership estate. At the very least, certain of the claimants may recoup more than 100% of their money lost, while other claimants will only receive the distribution made by the limited receivership estate.

The Department believes it is important to encourage investors to seek their own recoveries. However, it is also important that the assets of the receivership be distributed so as to achieve an equal recovery for all claimants. The funds of the receivership estate are limited and,

¹ We do not know if, and to what extent, additional distributions will be made by the Receiver. The Receiver’s collection efforts are continuing and the Department has filed lawsuits that may result in recoveries being directed to the receivership estate.

for purposes of distributing those limited funds, it is inequitable to recognize more loss than the claimants have actually suffered.

AUTHORITY

This Court has the broad power of a court of equity to determine the appropriate action in the administration and supervision of an equity receivership. See *SEC v. Hardy*, 803 F.2d 1034, 1037 (9th Cir. 1986). When a court appoints a receiver, that court “has the power to control, **at its discretion**, all controversies which affect the property placed in the control of the receiver.” *Mohoma Oil Company v. Ambassador Oil Corporation*, 1970 OK 161, ¶34, 474 P.2d 950 (emphasis added).

In *SEC v. Capital Consultants, LLC*, 397 F.3d 733 (9th Cir. 2005), the court considered how to account for third party recoveries in connection with a similar “Ponzi” scheme that was in receivership. The *Capital Consultants* trial court approved a distribution plan providing that “each dollar received through third party recoveries reduced the distribution from the receiver by 50%.” *Id.* at 738. The Ninth Circuit determined that the 50% offset provision “allow[ed] for more equal compensation” to the claimants and yet still encouraged them to pursue third party recoveries. *Id.* at 741. The Ninth Circuit has also confirmed the discretion of trial courts to order distribution plans wherein claims were offset by 100% of third-party recoveries. *Id.* at 739-740.

REQUEST TO EQUALIZE RECOVERY

To remedy the potential inequities, the Department suggests that this Court approve the Receiver’s claims as presented, but order that any moneys obtained by claimants from third party recoveries, net of costs and legal fees, be treated as money received for purposes of the approved claims and that such moneys be deducted from the amount of the approved claim. The adjusted claim amount would then become the Receiver’s basis for making pro rata distributions.

In connection with future third-party recoveries and additional distributions from the Receivership estate, the Department suggests that this Court disapprove any distributions to Claimants who have been made whole by third-party recoveries until such time as all claimants have been made whole. If, prior to the close of this receivership estate, a Claimant ultimately obtains more money from the Receivership estate than he would be entitled to receive under his adjusted claim amount, the Claimant should return that money to the Receivership for distribution to other claimants.

To facilitate this process, the Department suggests that this Court order each Claimant to submit a sworn statement to the Receiver, prior to the initial and any future distribution, stating under penalty of perjury the activities they have engaged in related to recoveries against third-parties, the status of those activities and any results they have achieved. The Department further suggests that the Court condition each claimant's receipt of each distribution on the submission of the sworn statement. The Department has attached as Exhibit 1 a proposed form of the sworn statement.

CONCLUSION

To ensure the equitable treatment of approved claimants in connection with the distribution of the limited receivership funds, Plaintiff respectfully requests that this Court order all distributions to be based on claim amounts reduced by the amounts of any third party recoveries and that such distributions be done in accordance with the conditions and procedure proposed above or any similar conditions or procedure that this Court deems appropriate.

Respectfully submitted,



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I hereby certify that on the 28th day of August 2007, I mailed a true and correct copy of the above and foregoing instrument, postage pre-paid to:

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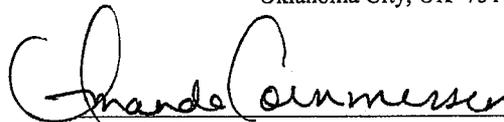
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Amanda Cornmesser

SWORN STATEMENT

STATE OF OKLAHOMA)
)
COUNTY OF _____) ss.

I, _____, of lawful age, being first duly sworn upon oath, state:

1. Have you taken steps to investigate, demand or recover losses against third parties, including brokerage firms or any other financial institution, relating to your losses arising from the activities of Marsha Schubert and/or Schubert and Associates?

____ Yes ____ No

2. If you answered "Yes" in #1 above, please identify the parties, forum and case number.

3. Have the lawsuit(s) and/or claim(s) identified in #2 above been settled or reached judgment.

____ Yes ____ No

4. If you answered "Yes" in #3 above, please state the amount you received from each entity, net of costs and legal fees.

5. If you answered "No" in #3 above, please state when your matter is scheduled to be heard.

FURTHER AFFIANT SAYETH NOT.

Dated this _____ day of _____, 2007.

_____, AFFIANT

Subscribed and sworn to before me this _____ day of _____, 2007.

(SEAL)

NOTARY PUBLIC

