

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

FEB 24 2009

PATRICIA PREGLEY, COURT CLERK
by _____
DEPUTY

| | |
|---|---|
| Oklahoma Department of Securities |) |
| <i>ex rel.</i> Irving L. Faught, Administrator, |) |
| |) |
| Plaintiff, |) |
| |) |
| vs. |) |
| |) |
| Jerry D. Cash, |) |
| |) |
| Defendant, |) |
| |) |
| -and- |) |
| |) |
| Sherry J. Cash |) |
| |) |
| Intervenor. |) |

Case No. CJ-2008-7963

**INTERVENOR'S REPLY TO PLAINTIFF'S RESPONSE TO
INTERVENOR'S MOTION TO MODIFY TEMPORARY
INJUNCTION AND ORDER FREEZING ASSETS**

Comes now the Intervenor, Sherry J. Cash (the "Intervenor"), and for her reply to Plaintiff's Response ("Plaintiff's Response") to Intervenor's Motion to Modify Temporary Injunction and Order Freezing Assets ("Intervenor's Motion"), states as follows:

Summary of Plaintiff's Response

The statements/claims made in Plaintiff's Response can be summarized as follows:

- (1) Plaintiff claims that Defendant received funds from a series of fraudulent financial transactions which were "commingled" with personal funds of the Defendant and Intervenor in bank accounts which are now subject to the Injunction and Freeze.
- (2) Plaintiff claims the Injunction and Freeze are necessary to preserve assets for "Defendant's payment of disgorgement."
- (3) Plaintiff states that a civil action in tort is different from a divorce proceeding in that the purpose of a tort action is to "establish liability for a legal wrong and to recover damages."

- (4) Plaintiff claims Intervenor has failed to identify an asset that should not be subject to the Injunction and Freeze.
- (5) Plaintiff states that funds in the amount of \$800,000.00 do not exist in the bank accounts which are the subject of the Injunction and Freeze.

Intervenor's reply to each of these statements/claims by Plaintiff is set forth below.

a. Commingling of Funds.

According to Plaintiff, funds obtained by Defendant through a series of fraudulent transactions were commingled with personal funds of Defendant and Intervenor in bank accounts now subject to the Injunction and Freeze. Even if you accept this statement as true, it does not serve to defeat Intervenor's Motion.

The Court's Injunction and Freeze extend well beyond the personal bank accounts of Defendant and Intervenor. It also extends to their marital residence. The Intervenor has clearly traced \$900,000.00 in money and property to the value of the residence which are "untainted" by any of the alleged wrongful acts of Defendant. That fact is undisputed and remains true even if wrongfully obtained funds were commingled in bank accounts.

b. Preservation of Assets and Payment of Disgorgement.

According to Plaintiff, Intervenor's Motion should be denied because the Injunction and Freeze are necessary to preserve assets "for Defendant's payment of disgorgement." In support of this statement, Plaintiff cites an *unpublished* decision from the United States District Court for the Southern District of Florida. Plaintiff's argument has no merit for two (2) reasons.

First, even the Plaintiff concedes that the reason for the Injunction and Freeze is "Defendant's payment of disgorgement." Since no allegations of wrongdoing have been asserted against Intervenor, Intervenor is not personally liable for Defendant's wrongful acts. It makes no sense that

the assets of an innocent third party should be the subject of the Injunction and Freeze for “Defendant’s payment of disgorgement.”

Second, the case cited by Plaintiff is clearly distinguishable from the circumstances now before the Court. *See S.E.C. v. Lauer*, 2007 WL 1394001 (S.D. Fla.). In *Lauer*, a non-party spouse sought relief from an order freezing her husband’s assets for support for herself and her children. In denying her request, the court first noted that she was not a party to the action and had not sought to intervene. For that reason, the court concluded she did not have standing to seek the relief requested. The court went further to state, however, that even if she had standing the court would deny her request. All of her husband’s assets had been frozen in order to preserve sufficient funds to reimburse the victims of his alleged fraud. According to the court, a blanket freeze remained appropriate because her husband’s liability for disgorgement was anticipated to exceed his known assets. The court’s opinion in *Lauer* says little else and is not reported. However, the briefs are available for review and reveal much more.

A review of the briefs discloses that the following important facts regarding the *Lauer* case which are conspicuously absent from Plaintiff’s Response:

- (1) The party seeking relief was alleged to be complicit in her spouse’s acts of wrongdoing; and
- (2) The party seeking relief had married her spouse after the court’s order freezing assets had been put in place.

None of these facts exist in this case. Intervenor married the Defendant long before any of the alleged acts of wrongdoing occurred (they married in September of 2001). No allegations of wrongdoing have been alleged against the Intervenor. More importantly, it is undisputed that Intervenor has traced \$900,000.00 of “untainted” money and property in which she has an interest

to an asset now subject to the Injunction and Freeze. The unpublished *Lauer* decision is inapposite and should be ignored.

c. The Nature of a Tort Action.

Plaintiff next states that the Court should maintain control of “all of Defendant’s assets” until final resolution of this matter. Plaintiff goes on to state that a “civil action in tort is different from a divorce proceeding” in that the purpose of a tort action “is to establish liability for a legal wrong and to recover damages.” The Plaintiff cites *Miller v. Miller*, 1998 OK 24, 956 P. 2d 887 as support for these statements. Plaintiff’s statements serve to support, not defeat, Intervenor’s Motion.

Plaintiff maintains that the Court should maintain control of all of “Defendant’s” assets. Plaintiff, however, offers no justification for this Court to control the “untainted” assets of persons other than the Defendant.

Plaintiff’s statement regarding the purpose of a tort action also supports Intervenor’s Motion. According to Plaintiff, the purpose of a tort action is “to establish liability for a legal wrong and to recover damages.” The only allegations of wrongdoing, however, are made *only* against the Defendant. The fundamental tort principles quoted by Plaintiff do not support the argument that Intervenor’s interest in “untainted” assets should be subject to the Injunction and Freeze when she has no liability for the consequences of the alleged acts of wrongdoing.

d. Alleged Failure to Identify Asset That Should Not Have Been Frozen.

Citing paragraph 14 of Intervenor’s motion, Plaintiff makes the conclusory statement that Intervenor has failed to identify an asset which should not be subject to the Injunction and Freeze. This statement is simply inaccurate. Intervenor’s motion clearly traces \$900,000.00 in “untainted” money and property to the value of the residence which is the subject of the Injunction and Freeze.

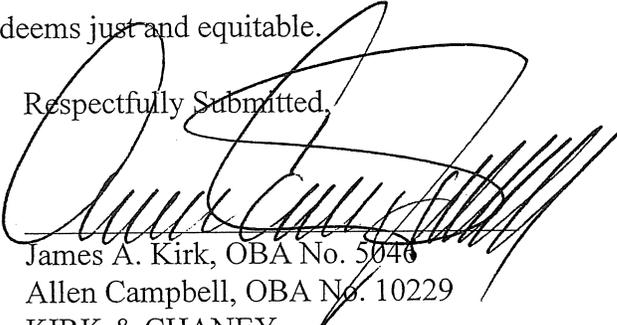
That fact is undisputed. Again, Plaintiff offers no justification for the imposition of the Injunction and Freeze on the Plaintiff's interest in this "untainted" component of the value of that property.

e. **Balance of Bank Accounts Subject to the Freeze.**

Finally, Plaintiff alleges that Intervenor's Motion should be denied because less than \$800,000.00 is in the bank accounts now subject to the Court's Injunction and Freeze. This statement also does not support the denial of Intervenor's Motion. The bank accounts are not the only asset subject to the Injunction and Freeze. Plaintiff's argument ignores the \$900,000.00 in "untainted" money and property traced by Intervenor to the residence in which she has an interest.

WHEREFORE, Intervenor prays that this Court modify its December 19, 2008 ruling to authorize the Court in the Dissolution Action to award interim divisions of property, temporary support alimony, attorneys' fees and suit money and other equitable relief to Intervenor in an amount not exceeding \$900,000.00, in the aggregate, from the Excluded Accounts and/or other assets now subject to the Injunction and Freeze, as prayed for in Intervenor's motion. Intervenor further prays that this Court enter any other order that the Court deems just and equitable.

Respectfully Submitted,



James A. Kirk, OBA No. 5046
Allen Campbell, OBA No. 10229
KIRK & CHANEY
101 Park Avenue, Suite 800
Oklahoma City, Oklahoma 73102
(405) 235-1333
(405) 235-5914 facsimile

Attorneys for Intervenor

CERTIFICATE OF SERVICE

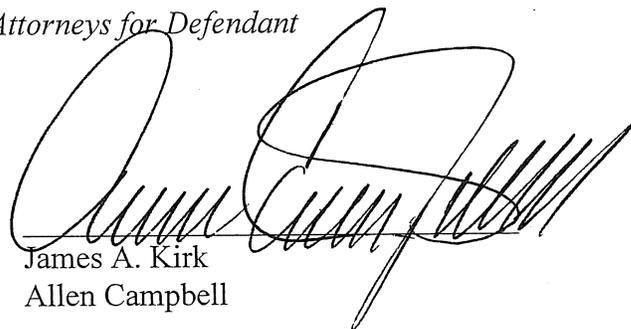
I hereby certify that on this 24th day of February, 2009, the above and foregoing document was mailed via U.S. Mail, postage pre-paid, to the following:

Shaun Mullins
Amanda Cornmesser
Jennifer Shaw
Oklahoma Department of Securities
120 North Robinson, Suite 860
Oklahoma City, Oklahoma 73102

Attorneys for Plaintiff

Patrick Ryan
Ryan, Whaley & Coldiron, P.C.
119 North Robinson Avenue
900 Robinson Renaissance
Oklahoma City, Oklahoma 73102

Attorneys for Defendant



James A. Kirk
Allen Campbell