

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

Oklahoma Department of Securities)
ex rel. Irving L. Faught, Administrator, et al.,)
)
Plaintiff,)
)
vs.)
)
Marsha Schubert, an individual and d/b/a ,)
Schubert and Associates, et al.,)
)
Defendants.)

Case No. CJ-2004-256

**RESPONSE TO OKLAHOMA DEPARTMENT OF SECURITIES
MOTION TO AMEND ORDER APPOINTING RECEIVER**

Respondents, identified on the attached Exhibit "1," respectfully request the Court to deny the Oklahoma Department of Securities Motion to Amend Order Appointing Receiver filed November 9, 2005, filed. The Oklahoma Department of Securities' third attempt to correct the original order appointing Receiver, Douglas L. Jackson, fails for the same reasons set forth in the Respondents' motion to vacate ex parte order appointing Douglas L. Jackson as receiver for investors and creditors of Marsha Schubert or alternatively, to transfer this motion to the Oklahoma County District Court ("Respondents' Motion") filed July 27, 2005. Respondents' Motion is incorporated by reference as though fully set forth herein and is attached as Exhibit "2."

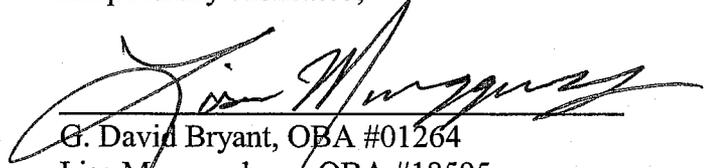
CONCLUSION

WHEREFORE, Respondents request that the Order appointing Jackson as receiver for the "investors and creditors" of Marsha Schubert be declared void and set aside, that Plaintiff's Motion to Amend Order Appointing Receiver filed November 9, 2005 be denied, and that they be granted such other and further relief as is just and proper, including an award of their attorney fees and costs.

rec'd 11-28-05

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Respectfully submitted,



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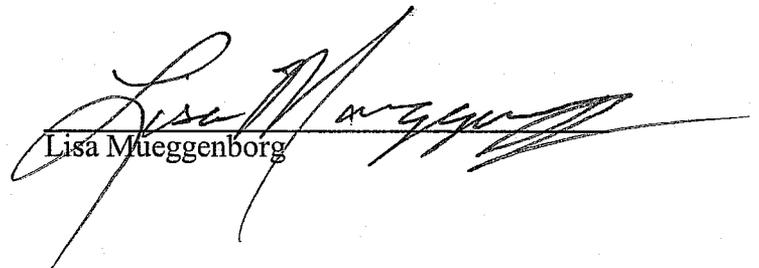
ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

This is to certify that on the 23rd day of November, 2005, true and correct copies of the above and foregoing were mailed via First Class Mail, postage prepaid to the following:

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LIST OF RESPONDENTS

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and as trustee for Revocable Trust)

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Sharon A. Allen

R. Kurt Blair

Wendy B. Blair

Jacquelyn Bounds

Maudie L. Cook

Dean Cue

Claudette Cue

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Marvin L. Wilcox

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Pamela J. Wilcox

Sean Winn

Glenda Yenzer

Phillip Yenzer

Alexandra Young

Kenneth Young

Leslie A. Young

EXHIBIT 1

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STATE OF OKLAHOMA

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LOGAN COUNTY SS
FILED FOR RECORD

2005 JUL 27 AM 10: 58

Oklahoma Department of Securities)
ex rel. Irving L. Faught, Administrator, et al.,)
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Plaintiff,)
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vs.)
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Marsha Schubert, an individual and d/b/a ,)
Schubert and Associates, et al.,)
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Defendants.)

REJEANIA ZMEK
COURT CLERK

Case No. CJ-2004-258 BY _____ DEPUTY

**MOTION TO VACATE EX PARTE ORDER APPOINTING
DOUGLAS L. JACKSON AS RECEIVER FOR INVESTORS OF MARSHA SCHUBERT
OR ALTERNATIVELY, TO TRANSFER THIS
MOTION TO THE OKLAHOMA COUNTY DISTRICT COURT**

Movants, identified on the attached Exhibit "1," ask the Court to vacate its Order entered on or about December 10, 2004, purporting to appoint Douglas L. Jackson (hereinafter "Receiver" or "Jackson") as receiver for the "investors and creditors" of Marsha Schubert. ("Order").¹

¹To the extent necessary, Movants move pursuant to 12 O.S. §2024(A) for leave to intervene as of right in this action for the limited purpose of seeking to vacate this Court's December 10, 2004, *ex parte* order in which Jackson was purportedly appointed as the receiver of the "investors and creditors" of Marsha Schubert (the "*Ex Parte* Order"). On May 11, 2005, Jackson sued approximately 158 individuals in the case styled *Oklahoma Department of Securities ex rel. Irving L. Faught, Administrator v. Bob Mathews, et al.*, Case No. CJ-2005-3796, now pending in the District Court of Oklahoma County, State of Oklahoma (the "Oklahoma County Action"). Movants herein, and others joined in, moved for dismissal of the Oklahoma County Action on the grounds Jackson does not have standing to pursue the claims he is pursuing against them. In defending against Movants' dismissal motion, Jackson relied on the *Ex Parte* Order to establish his standing and, understandably, the Oklahoma County District Court Judge was reluctant to overturn an order of a sister Court. Consequently, to the extent intervention is necessary to seek vacature of the *Ex Parte* Order, Movants' ability to protect their interests will be impaired or impeded if intervention is not permitted. Alternatively, given that the *Ex Parte* Order is the predicate for Jackson's participation in the Oklahoma County Action, it is clear that the *Ex Parte* Order has already had a substantial impact on Movants, and others, and they should be allowed to permissively intervene under 12 O.S. §2024(B) to litigate the common question of law whether the *Ex Parte* Order is proper and to thereby protect their interests seeking to vacate such order. Permitting the requested intervention will allow the efficient adjudication of these common issues in a single proceeding.

EXHIBIT

2

In support hereof, Movants state:

PROCEDURAL AND FACTUAL BACKGROUND

On October 14, 2004, the Oklahoma Department of Securities ("ODS") initiated this receivership action against "Marsha Schubert, individually and doing business as Schubert and Associates (Marsha Schubert) [a sole proprietorship]." On October 14, 2004, Jackson was appointed the Receiver for Marsha Schubert and her assets. Then, on December 10, 2004, the original order appointing the Receiver was amended to provide that Jackson could also serve as Receiver over the assets of non-party "investors and creditors" of Marsha Schubert, including but not limited to Movants. The December 10, 2004 Order is attached for reference as Exhibit "2."

Specifically, the Order was sought and entered *ex parte* without affording anyone prior notice or an opportunity to be heard. The Order was entered pursuant to an amended motion filed on November 15, 2004 ("Amended Motion"). (See attached Exhibit "3.") The Amended Motion is devoid of any legal authority authorizing the purported expansion of the scope of Jackson's powers and authority. Yet, the Order attempts to vest in the Receiver all property rights and claims, if any, of the "investors and creditors" of Marsha Schubert.

The order is not consistent with Oklahoma law. More specifically, it is well settled that a receivership is an *in rem* proceeding and that a receiver simply holds property rights of the defendant placed in receivership. Here, the Defendant is Marsha Schubert, who holds no claims against the "investors and creditors" of Marsha Schubert. Accordingly, the Receiver cannot be appointed to bring claims owned by anyone other than Marsha Schubert.

Nonetheless, on May 11, 2005, the ODS and Receiver filed a petition in Oklahoma County against the Movants and other named defendants styled: *Oklahoma Department of Securities ex. rel. Irving L. Faught, Administrator v. Bob Mathews, et. al.*, Case No. CJ-2005-

3796, filed in Oklahoma County District Court, State of Oklahoma, ("Oklahoma County Petition"). The action essentially asserts that plaintiffs can pursue claims of investors against other investors, all of which were admitted by plaintiffs to be innocent victims of a Ponzi scheme and not guilty of any wrongdoing or violations of securities laws.

In response, and in order to avoid being in default, the Movants specially appeared and filed a motion to dismiss, which was joined into by numerous other defendants. The motion was heard in the Oklahoma County Court on July 18, 2005 by the Honorable Patti G. Parrish. At the hearing, Judge Parrish repeatedly raised her concerns regarding appointment of a receiver for the "investors and creditors" of Marsha Schubert. (See Transcript p. 15, ll. 12-17, p.22 ll. 17-24, p. 23 ll. 7-14, p. 37 ll. 9-18, p. 40 ll. 5-17, p. 46 ll. 8-14, p. 50 ll. 13-20, p. 57 ll. 13-14, p. 57 ll. 25-58; Oklahoma County Court Transcript of Proceedings, attached as Exhibit "4.") Even at one point the court stated:

THE COURT: "How would one of the individual investors have had any notice of what was going on?" (See Transcript Page.57, Lines 13-14)

Finally, with due deference to this Court, Judge Parrish chose to deny Movants' motion to dismiss, stating however that should this Court revoke its December 10, 2004 Order, "I would be granting a motion to dismiss with regard to the receiver in this case." (See Transcript, Page58, Lines 17 - 19.) As a result, Judge Parrish stayed the case before her pending determination of matters presently set before this Court on August 12, 2005.

To Movants, it appears the ODS and Receiver filed their action in Oklahoma County rather than here in order to prevent this Court from exercising review of its own orders. This is not inconsistent with the repeated expressions of Judge Parrish during the hearing before her.

ARGUMENT

Since this Court's Order is interlocutory in nature, it can be vacated at any time. *Winston v. Stewart & Elder*, 2002 OK 68, 55 P.3d 1063; *Grant Drilling Co. v. Rebold*, 1937 OK 719, 75 P.2d 172; *Exchange Trust Co. v. Oklahoma State Bank of Ada*, 1927 OK 182, 259 P. 589; and 65 Am. Jur. 2d Receivers § 66.

A. THE ORDER UNCONSTITUTIONALLY DEPRIVES THE MOVANTS OF PROPERTY WITHOUT HAVING AFFORDED THEM DUE PROCESS

Oklahoma law, like Federal law, provides that:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all of the circumstances, to apprise **interested parties** of the pendency of the action and afford them an opportunity to present their objections.' (Emphasis added.) *Hutchins v. Smith* 538 P.2d 610, 612 (Okla. App. 1975); Quoting, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865, at page 314, 70 S.Ct. at 657; (The Oklahoma Supreme Court stated in *Hutchins* that "Oklahoma has long recognized the Mullane doctrine." *Hutchins*, 538 P.2d at 612; quoting, *Bomford v. Socony Mobil Oil Co.*, 1968 OK 43, 440 P.2d 713, 718.)

Prior notice must be given to interested parties; otherwise, the order is void. *See B.F. Hutchins v. Smith*, 1975 OK CIV APP 28, 538 P.2d 610. Without prior notice the ODS inappropriately sought and obtained the Order. A fundamental tenet is that no one may be deprived of property without due process. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652. Nonetheless, the Order deprives these Movants of their due process rights. Consequently, the Court's Order should be vacated.

Moreover, to have properly invoked this Court's jurisdiction to enter the Order, the ODS would have had to file a petition against the Movants and served it upon them. 12 O.S. §§2003, 2004. The ODS failed to do so. If a court exercises control over a case when it lacks jurisdiction over the subject, the judgment is void. *Keizer v. Sand Springs Railway Company*, 1993 OK CIV

APP 98, 861 P.2d 326, 328; citing *Harber v. McKeown*, 1945 OK 101, 157 P.2d 753. So it is here. Therefore, the Court's Order should be vacated.

B. UNDER OKLAHOMA LAW THE ODS HAS NO AUTHORITY TO SEEK APPOINTMENT OF JACKSON AS THE RECEIVER FOR THE "INVESTORS AND CREDITORS" OF MARSHA SCHUBERT.

1. A receiver cannot be appointed over individuals who are not parties to the receivership proceeding.

"The power to appoint a receiver is a delicate one and should be exercised with extreme caution." *Panama Timber Company, Inc. v. Barsanti*, 1980 OK CIV APP 18, 633 P.2d 1258, 1262. The jurisdiction of the court is "confined to the rights and interests of the one whose estate is being administered **and the court lacks authority to administer the estate of another who is not a party to the receivership proceeding.**" 75 C.J.S. § 13 Property Subject to Receivership. (emphasis supplied.) In this regard, the Supreme Court of Oklahoma in *Harris v. Cook*, 1936 OK 84, 57 P.2d 606, stated that "[a]s a general rule, a court is without jurisdiction to appoint a receiver of property of a debtor not involved in the litigation. . ." None of the "investors and creditors" of Marsha Schubert are her debtors nor parties to her receivership proceeding. Therefore, Jackson cannot serve as their receiver. Accordingly, this Court should vacate its December 10, 2004 Order.

2. The ODS has no right to or interest in the property of individuals other than Marsha Schubert.

"Although a receivership is typically created to protect the rights of creditors, the receiver is not the class representative for creditors and receives no general assignment of rights from the creditors. Thus, the receiver can bring actions previously owned by the party in receivership (*i.e.* "Marsha Schubert") for the benefit of the creditors, but he or she cannot pursue claims owned directly by the creditors." See, *Freeman v. Dean Witter Reynolds, Inc.*, 865 S.2d 543, 550 (2nd Cir. 2003). This is equally applicable under Oklahoma law:

“It is . . . well settled that a receiver simply holds property coming into his hands by the same right and title as the person for whose property he is receiver. Lawson v. Warren, 34 Okl. 94, 124 Pac. 46, 42 L.R.A. (N.S.) 183, Ann. Cas. 1914C, 139; Pardee v. Aldridge, 189 U.S. 429, 23 Sup. Ct. 514, 47 L. Ed. 833.”
Miller v. Thompson, 1923 OK 426, 216 P. 641, 644.

Neither the ODS, nor Jackson as the Receiver over Marsha Schubert’s estate, have any right, title or interest over the assets of non-parties, i.e., the “investors and creditors” of Marsha Schubert. The ODS and the Receiver are merely officious intermeddlers who have wrongly interfered with the rights of strangers to this proceeding. The property rights of the “investors and creditors” of Marsha Schubert are solely owned by them. They are thus free to assert their personal rights as they see appropriate without interference from the ODS or Jackson.

3. Under 71 O.S. §1-603 The Receiver is restricted to controlling and administering the assets of the defendant, Marsha Schubert.

The ODS can only enforce the Oklahoma Securities laws against "wrongdoers," 71 O.S. §1-603(A). Section 1-603(A) provides the following:

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. 71 Okl.St. Ann. § 1-603.

The ODS does not allege any wrongdoing by the Movants. Therefore, the ODS cannot assert any claim against them under 71 O.S. § 1-603(A).

The relief available to the Administrator to enforce the Oklahoma Securities laws is found in Section 1-603(B). In pertinent part, it allows 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," and "[o]rder such other relief as the court considers appropriate." 71 O.S. §§ 1-603(B)(2)(a)(b) and (3). The "**defendant's property**" referred to in section 1-603 is Marsha Schubert's property and no one else's.

Furthermore, section 1-603(B)(2)(a) provides in relevant part that the court may order the "appointment of a receiver or conservator, that may be the Administrator, **for the defendant or the defendant's assets** ." 71 O.S. § 1-603(B)(2)(a). Therefore, section 1-603(B)(2)(a) equally restricts the ODS and the courts to the appointment of a receiver **for the defendant or the defendant's assets**. Clearly, none of these Movants are defendants in this lawsuit. In fact, they are not parties to this lawsuit at all.

The ODS is limited in scope of authority given to it by the Oklahoma legislature. More specifically, "**All governmental organs, including investigatory bodies, must remain within the bounds of the law, and it is this court's duty to confine them within the outer limits of their legal authority.**" *Winters v. Governors Special Committee*, 1967 OK 249, 441 P.2d 370, 374; citing, *Oklahoma Tax Commission et al. v. Clendinning*, 193 Okl. 272, 143 P.2d 143.

The Oklahoma legislature did not enact legislation authorizing the appointment of a receiver over property owned by anyone other than "wrongdoers." See 71 O.S. §1-101 et. seq. A review of Title 71 reveals nothing to suggest that the state legislature intended to allow the appointment of a receiver over the assets of innocent third parties. Moreover, the Oklahoma Supreme Court states:

[T]he primary goal of statutory interpretation is to ascertain and follow the Legislature's intention. See *Fulsom*, 2003 OK 96, at ¶ 7, 81 P.3d at 655; see also *TRW/Reda Pump v. Brewington*, 1992 OK 31, 829 P.2d 15, 20. "[T]he plain meaning of a statute's language is conclusive except in the rare case when literal construction produces a result demonstrably at odds with legislative intent." *Samman* 2001 OK 71, at ¶ 13, 33, P.3d at 307, relying on *City of Tulsa v. Public Employees Relations Board*, 1998 OK 92 ¶ 14, 967 P.2d 1214, 1220. A court is

duty-bound to give effect to legislative acts, not amend, repeal or circumvent them. *City of Tulsa*, 1998 OK 92, at ¶ 18, 967 P.2d at 1221. When a court is called on to interpret a statute, the court has no authority to rewrite the enactment merely because it does not comport with the court's view of prudent public policy. *See id.* Also, the wisdom of choices made within the Legislature's law-making sphere are not our concern, because those choices—absent constitutional or other recognized infirmity – rightly lie within the legislative domain. *See Fulsom*, 2003 OK 96, at ¶ 14, 81 P.3d at 658. *Head v. McCracken*, 2004 OK 84, ¶ 13, 102 P.3d 670; *See also, McCathern v. City of Oklahoma City*, 2004 OK 61, ¶17.

The ODS is limited to bringing civil actions only against defendants who have engaged in wrongful acts. 71 O.S. § 1-603(A). Movants have not been alleged to have engaged in any wrongful acts. Thus, the ODS overstepped its legislative mandate when it sought and obtained the Order. The Receiver for Marsha Schubert is likewise limited and the Order purportedly expanding his power and authority must therefore be vacated.

4. Movants are entitled to their attorney fees.

Because the ODS wrongly sought appointment of a receiver for the “investors and creditors” of Marsha Schubert, the Movants are entitled to recover their legal fees and costs as a matter of law. More specifically, Justice Arnold of the Oklahoma Supreme Court summarized this universally followed rule in his dissent in *Gibbons v. Atlas Supply Co.*, 1941 OK 134, 124 P.2d 969:

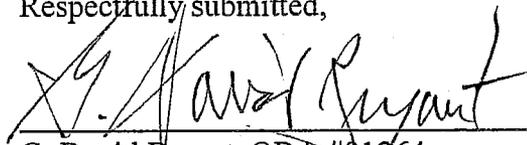
[W]here a receivership is void for want of power or jurisdiction, the receivership is wrongful from the beginning; and having no probable interest, the party instituting the proceedings and procuring such an appointment or extension is liable for all damages flowing therefrom without regard to his good faith or probable cause. Probable cause, good faith and absence of malice constitute no defense in such a case. *K.C. Oil Co. v. Harvest Oil & Gas Co.*, 80 Okl. 61, 194 P. 228; *Wagoner Oil & Gas Co. v. Marlow*, 137 Okl. 116, 278 P. 294, 310. *Gibbons*, 124 P.2d at 974; *See also, McGrath v. Clift*, 1947 OK 168, 181 P.2d 555.

Therefore, Movants respectfully request that the ODS be ordered to pay the Movants' attorneys fees and costs they have incurred because of the wrongful appointment of Jackson over them.

CONCLUSION

WHEREFORE, Movants request that the Order appointing Jackson as receiver for the “investors and creditors” of Marsha Schubert be declared void and set aside and that they be granted such other and further relief as is just and proper, including an award of their attorney fees and costs.

Respectfully submitted,



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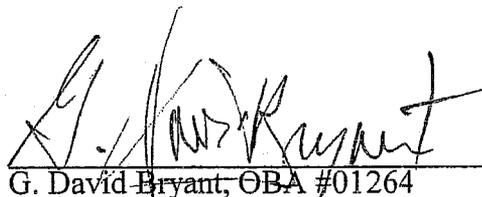
ATTORNEYS FOR MOVANTS

CERTIFICATE OF SERVICE

This is to certify that on the 27th day of July, 2005, true and correct copies of the above and foregoing were hand delivered to the following:

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