

IN THE DISTRICT COURT OF KAY COUNTY
STATE OF OKLAHOMA

Filed in the DISTRICT COURT
Kay County, Oklahoma

SEP 15 2004

GLEND A EMERSON, Court Clerk
BY _____ DEPUTY

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

Plaintiff,)

v.)

Southern Cross Ltd., and)
Charles Scherer,)

Defendants.)

Case No. CV-2004-69

**MOTION FOR DEFAULT JUDGMENT AGAINST SOUTHERN CROSS LTD. AND
CHARLES SCHERER AND BRIEF IN SUPPORT**

Plaintiff, Oklahoma Department of Securities *ex rel.* Irving L. Faught, Administrator, moves this Court to enter judgment by default in its favor and against the above-named Defendants ("Defendants"), and offers this brief in support of the motion.

I.

Summary of Action

On June 22, 2004, Plaintiff filed a Petition for Permanent Injunction and other Equitable Relief ("Petition") against Defendants pursuant to Section 406.1 of the Oklahoma Securities Act ("Act"), Okla. Stat. tit. 71, §§ 1-413, 501, 701-703 (2001 & Supp. 2003). In its Petition, Plaintiff alleged that Defendants offered and sold unregistered securities in violation of Section 301 of the Act, failed to register as agents and/or employed unregistered agents in violation of Section 201 of the Act, and perpetrated fraud in connection with the offer, sale or purchase of securities in violation of Section 101 of the Act.

On August 24, 2004, personal service of a copy of the Summons issued in this matter by the clerk of the Court, along with a copy of the Petition, was attempted on Defendants, by a licensed process server, at the Defendants' last known address, 1685 Virginia Street, in Wrightwood, California. Since service was not made on an officer, a managing or general agent, or any other authorized agent of Defendant Southern Cross Ltd., and since the last known address of Defendant Scherer is not his usual place of abode, service was made on Defendants by publication on July 22, 2004, July 29, 2004, and August 6, 2004, in the *Newkirk Herald Journal*, published in Kay County, Oklahoma.

II.

Default Judgment is Appropriate

Plaintiff submits that valid service of the Summons and the Petition upon Defendants has been effected pursuant to Okla. Stat. tit. 12, § 2004 (2001 and Supp. 2003). As stated in the published notice, Defendants had until September 9, 2004, to answer the Petition. Under Okla. Stat. tit. 12, § 2004(C)(3)(c), this designated date was not less than forty-one (41) days from the date of the first publication. To date, Defendants have failed to answer the Petition or otherwise plead.

Plaintiff further submits that as a result of Defendants' failure to answer, the allegations in Plaintiff's Petition are deemed admitted. Okla. Stat. tit. 12, § 2008(D) (2001), pertaining to the general rules of pleadings, states: "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." Plaintiff's Petition alleges that Defendants violated Sections 101, 201, and 301 of the Act. Defendants have not answered the allegations in Plaintiff's Petition. As

provided by Okla. Stat. tit. 12, § 2008(D) (2001), such averments must be deemed admitted by Defendants.

Plaintiff therefore respectfully requests that judgment be entered in its favor as requested in the Petition.

III.

Plaintiff's Requested Relief is 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 Dollars (\$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).

In its Petition, Plaintiff requested that the Court:

1. permanently enjoin Defendants from offering and selling any security in and/or from this state;
2. order Defendants to make restitution to Gail Peavey, the surviving spouse of Roger Peavey, and Robert Traynor ("Investors") who purchased securities from Defendants or who transferred money to Defendants for the purpose of making securities investments on their behalf;
3. impose a civil penalty against Defendants in the amount of Fifty Thousand Dollars (\$50,000); and
4. order such other equitable relief as the Court may deem necessary, just and proper in connection with the enforcement of the Act.

The allegations in the Petition having been admitted, Plaintiff has established a sufficient basis for the relief requested. The power to enforce implies the power to make effective the right of recovery afforded by the Act. *See Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940). Justice is only served in this case if all appropriate relief is granted against the Defendants.

First, Plaintiff seeks a permanent injunction against Defendants. Once the Plaintiff has shown the Defendants' past conduct is in violation of the Act, the proper test for the issuance of a statutory injunction is whether there is a reasonable expectation of future violations by Defendants. *S.E.C. v. Manor Nursing Centers, Inc.*, 458 F.2d 1082 (2nd Cir. 1975); *S.E.C. 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.*, 1980 OK CIV APP 60, ¶ 13, 622 P.2d 293, 295 (Okla. Ct. App. 1980). As described above and in the Petition, Defendants have violated the Act, creating a presumption of a likelihood of future violations.

Second, Plaintiff seeks restitution from Defendants in the sum of Two Hundred Thirty Thousand Dollars (\$230,000.00) to Investors. This sum is the amount of money Defendants received from Investors.

Third, Plaintiff seeks a civil penalty against Defendants in the sum of Fifty Thousand Dollars (\$50,000.00). This is the maximum civil penalty that can be imposed under the Act and is warranted due to the serious nature of the violations of the Act by Defendants. The serious nature of the violations is evidenced by the amount of money received from Investors and the methods of operation of Defendants.

IV.

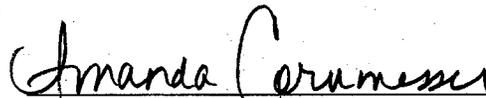
Conclusion

Plaintiff has obtained proper service on Defendants. The allegations in the Petition being admitted by Defendants' failure to timely answer, Plaintiff respectfully requests that the Court enter judgment in its favor by:

1. permanently enjoining Defendants from offering and selling any security in and/or from this state;
2. ordering Defendants to make restitution to Gail Peavey, the surviving spouse of Roger Peavey, and Robert Traynor;
3. imposing a civil penalty against Defendants in the amount of Fifty Thousand Dollars (\$50,000); and

4. ordering such other equitable relief as the Court may deem necessary, just and proper in connection with the enforcement of the Act.

Respectfully submitted,



Rebecca Cryer OBA #2065

Amanda Cornmesser OBA #20044

Oklahoma Department of Securities

120 North Robinson, Suite 860

Oklahoma City, Oklahoma 73102

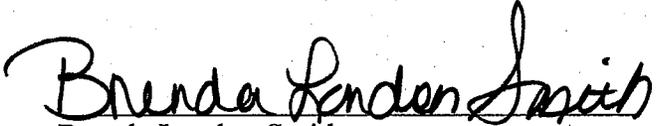
Telephone (405) 280-7700

CERTIFICATE OF MAILING

The undersigned certifies that on the 15 day of September, 2004, a true and correct copy of the foregoing was mailed via First Class Mail, postage prepaid, to the following:

Charles Scherer
1685 Virginia
Wrightwood, CA 92397

Southern Cross Ltd.
1685 Virginia
Wrightwood, CA 92397

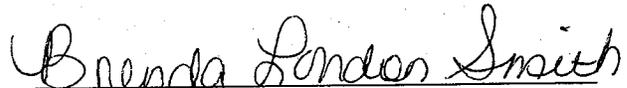

Brenda London Smith
Paralegal

CERTIFICATE OF MAILING

The undersigned certifies that on the 22nd day of September, 2004, a true and correct copy of the foregoing was mailed via First Class Mail, postage prepaid, to the following:

Charles Scherer
1685 Virginia
Wrightwood, CA 92397

Southern Cross Ltd.
1685 Virginia
Wrightwood, CA 92397


Brenda London Smith
Paralegal