

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 (Okl. 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. *Keizor 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:

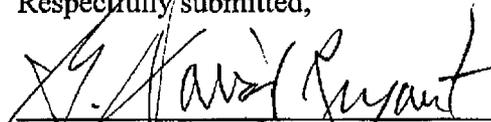
[W]here a receivership is void for want of power or jurisdiction, the receivership is wrongful from the beginning; and having no probable interest, the party instituting the proceedings and procuring such an appointment or extension is liable for all damages flowing therefrom without regard to his good 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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Oklahoma City, OK 73102

Bradley E. Davenport
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Enid, OK 73702-1549



G. David Bryant, OBA #01264

LIST OF MOVANTS

Beth Armer (Individually
and as trustee for Revocable Trust)

Ben J. Allen

Sharon A. Allen

R. Kurt Blair

Wendy B. Blair

Jacquelyn Bounds

Maudie L. Cook

Dean Cue

Claudette Cue

Steven R. Espolt

William Etheridge

Angela D. Ewers

Danny Gregory

Martha Gregory

Melvin E. "Sonny" Harman

Rebecca Honeyman

Bob E. Hudson

Crystal Jackson

Daniel Jackson

Loyd R. Jones

Shanna Kinslow

Betty Lamb

Kenneth LaRue

Christopher LaRue

K.R. LaRue

Raymond C. Laubach

Carol A. Lindley

Kerry Long

Willis Luber

Rodney J. Martin

Wanda Martin

Robert W. Mathews

Martin W. Mathews

Sheryl Mercer

Robert J. Owens

Detria J. Owens

Jeffrey Palmer

Ted A. Payne

Laura Payne

Joyce E. Payne

Sandra K. Phillips

Theresa Pittman

Arthur Platt

Timothy W. Rains

Krista Rains

Michael Rogers

Curtis R. Sanders

Gary L. Scott

Manuel Segura

Neil Sheehan

Edward G. Stanton

E.E. Tackett

Justin R. Tarrant

Wade Toepfer

Elnora Viefhaus

Billie A. Vincent

Scott A. Wilcox

Marvin L. Wilcox

Jeffrey L. Wilcox

Pamela J. Wilcox

Sean Winn

Glenda Yenzer

Phillip Yenzer

Alexandra Young

Kenneth Young

Leslie A. Young



IN THE DISTRICT COURT OF LOGAN COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA
LOGAN COUNTY SS:
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Oklahoma Department of Securities
ex rel. Irving L. Faught,
Administrator,

Plaintiff,

v.

Case No. CJ-2004-256

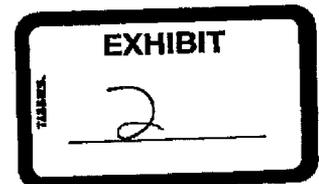
Marsha Schubert, an individual and
dba Schubert and Associates;
Richard L. Schubert, an individual and
dba Schubert and Associates; and
Schubert and Associates,
an unincorporated association,

Defendants.

ORDER AMENDING AUTHORITY OF RECEIVER

This matter came on for hearing this 10th day of December, 2004, before the undersigned Judge of the District Court in and for Logan County, State of Oklahoma, upon the Plaintiff's Motion to Amend Order Appointing Receiver for modification of the Temporary Restraining Order, Order Appointing Receiver, Order Freezing Assets and Order for Accounting (Temporary Restraining Order) entered in this matter on October 14, 2004.

The Oklahoma Department of Securities appears through its attorneys Amanda Cornmesser and Gerri Stuckey. Defendants Marsha Schubert, individually and *dba* Schubert and Associates (Marsha Schubert), and Schubert and Associates appear through their attorney, Mack Martin. Defendant Richard L. Schubert (Richard Schubert) appears through his attorney William J. Baker. The Receiver, Douglas L. Jackson, appears through his attorney, Brad Davenport.



On October 14, 2004, upon Plaintiffs verified Petition for Permanent Injunction and Other Equitable Relief (Petition), this Court issued the Temporary Restraining Order pursuant to Section 1-603 of the Oklahoma Uniform Securities Act of 2004 (Act), Okla. Stat. tit. 71, §§ 1-101 through 1-701 (Supp. 2003).

On November 15, 2004, a permanent injunction was entered against Defendant Marsha Schubert and Schubert and Associates. The permanent injunction enjoins Marsha Schubert and Schubert and Associates from offering and selling securities and transacting business as a broker-dealer or agent in and/or from Oklahoma and provides for the continuation of the asset freeze and the receivership pending determination of the amount of restitution owed.

On December 10, 2004, a Temporary Order was entered modifying the Temporary Restraining Order with respect to Richard Schubert.

The Court, having been advised that the Receiver requires the additional authority requested to ensure the effective and equitable administration of the receivership, finds that granting that authority is in the public interest.

The Court, having reviewed all pleadings and submissions of the parties, finds that this Order Amending Authority of Receiver be issued in this matter by agreement of the parties.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Order Appointing Receiver should be modified as provided herein, and, therefore, Douglas L. Jackson ("Receiver"), be appointed receiver for the investors and creditors of Schubert and Associates; continue to serve as Receiver for the assets of Defendants as provided for in the Temporary Restraining Order as modified in the Temporary Order dated December 10, 2004, with respect to Richard Schubert, and as modified herein with respect to Marsha Schubert and Schubert and Associates, including, but not limited to, the Schubert and Associates investment program

described in the Petition (Schubert and Associates Investment Program). The Receiver is authorized to accomplish the following with regard to Marsha Schubert, Schubert and Associates, Kattails, LLC, and The End Zone:

1. to assume full control of the businesses known as Schubert and Associates, Kattails, LLC, and The End Zone, by removing, as the Receiver deems necessary or advisable, any director, officer, independent contractor, employee, or agent of those entities, including any Defendant, from control of, management of, participation in the affairs of, or from the premises of those entities;
2. to take immediate and exclusive custody, control and possession of all assets and the documents of, or in the possession or custody, or under the control of Defendants, of whatever kind and description, and wherever situated. The Receiver shall have full power to divert mail and to sue for, collect, receive, take possession of, hold, and manage all assets and documents of the Defendants;
3. to conserve, hold and manage all assets of Defendants and the businesses known as Schubert and Associates, Kattails, LLC and The End Zone pending further action by this Court in order to prevent any irreparable loss, damage or injury to investors; to conserve and prevent the withdrawal or misapplication of funds entrusted to Defendants, their agents, employees, officers, directors, principals, distributors, sales representatives and/or attorneys; to take the necessary steps to protect the interests of Investors, including the liquidation or sale of assets of Defendants; and to prevent violations of the Act by Defendants;

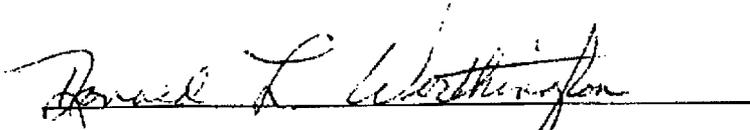
4. to make such payments and disbursements as may be necessary and advisable for the preservation of the assets of Defendants and as may be necessary and advisable in discharging his duties as Receiver;
5. to retain and employ attorneys, accountants, computer consultants and other persons as the Receiver deems advisable or necessary in the management, conduct, control or custody of the affairs of Defendants and of the assets thereof and otherwise generally to assist in the affairs of Defendants. Receiver may immediately retain or employ such persons, and compensate such persons, all subject to filing as soon as practicable with this Court, an application seeking approval of the employment;
6. to institute, prosecute and defend, compromise, adjust, intervene in or become party to such actions or proceedings in any state court, federal court or United States bankruptcy court as may in Receiver's opinion be necessary or proper for the protection, maintenance and preservation of the assets of Defendants, or the carrying out of the terms of this Order, and likewise to defend, compromise, adjust or otherwise dispose of any or all actions or proceedings now pending in any court by or against Defendants where such prosecution, defense or other disposition of such actions or proceedings will, in the judgment of the Receiver, be advisable or proper for the protection of the Assets of Defendants;
7. to institute actions on behalf of the Schubert and Associates Investment Program, its investors and creditors, including any actions against paid investors, brokerage firms, and/or third parties that the Receiver deems necessary to recover assets and to protect the interests of and promote equity among the investors.

8. to issue subpoenas ad testificandum and subpoenas duces tecum, take depositions, and issue written discovery requests to the parties, investors, family members of Defendants, business associates of Defendants, and other witnesses in and through the pending case of *Oklahoma Department of Securities v. Marsha Schubert, et. al.*, Logan County District Court, Case No. CJ-2004-256; and

9. to take all steps necessary to secure the business premises of the businesses known as Schubert and Associates, Kattails, LLC and The End Zone and to exercise those powers necessary to implement his conclusions with regard to disposition of this receivership pursuant to the orders and directives of this Court.

IT IS FURTHER ORDERED that in agreeing to the entry of this Order, Defendants waive no defenses to this case or the allegations made herein.

THIS ORDER IS ENTERED this 10 day of December, 2004, at 2:00 P.m.

A handwritten signature in cursive script, appearing to read "Ronald L. Leberthron", is written over a horizontal line.

DISTRICT COURT JUDGE

Approved as to Form and Substance:

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Attorney for Receiver, Douglas L. Jackson

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IN THE DISTRICT COURT OF LOGAN COUNTY
STATE OF OKLAHOMA

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STATE OF OKLAHOMA
LOGAN COUNTY SS:
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REJEANIA ZMEK
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BY DEPUTY

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

Plaintiff,)

v.)

Case No. CJ 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.)

PLAINTIFF'S MOTION TO AMEND ORDER APPOINTING RECEIVER

Plaintiff, the Oklahoma Department of Securities *ex rel.* Irving L. Faught, Administrator (Plaintiff), respectfully requests that the Order Appointing Receiver issued on October 14, 2004 be modified as described below.

On October 14, 2004, Plaintiff filed a Petition for Permanent Injunction and Other Equitable Relief (Petition) and an Application for a Temporary Restraining Order, Order Appointing Receiver, Order Freezing Assets, and Order for Accounting, pursuant to Section 1-603 of the Oklahoma Uniform Securities Act of 2004 (Act), Okla. Stat. tit. 71, §§ 1-101 through 1-701 (Supp. 2003). This Court issued a Temporary Restraining Order, Order Appointing Receiver, Order Freezing Assets, and Order for Accounting against Defendants Marsha Schubert, Richard Schubert and Schubert and Associates.



On November ____, 2004, a permanent injunction was entered against Defendant Marsha Schubert and Schubert and Associates. The permanent injunction enjoins Marsha Schubert and Schubert and Associates from offering and selling securities and transacting business as a broker-dealer or agent in and/or from Oklahoma and provides for the continuation of the asset freeze and the receivership pending determination of the amount of restitution owed.

The court-appointed receiver, Douglas L. Jackson (Receiver), has been very aggressive in marshalling and preserving the assets of the Defendants. However, it has become apparent that certain assets will not be discovered or recovered without the Receiver being granted some additional authority. In addition, the business entity through which the investment scheme was operated, Schubert and Associates, was an unincorporated association, and not a separate, legal, business entity. As such, the language suggested below will help clarify the Receiver's authority in respect to that distinction. Specifically, the Department requests that the Order Appointing Receiver be modified as follows:

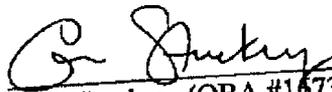
1. To appoint Douglas L. Jackson the Receiver for the Schubert and Associates investment program as described in the Petition (Investment Program) and for the investors and creditors of Schubert and Associates.
2. To grant the Receiver the authority to institute actions on behalf of the Investment Program and the investors, including any actions against paid investors, brokerage firms, and/or third parties that the Receiver deems necessary to recover assets and to protect the interests of and promote equity among the investors.
3. To grant the Receiver the authority to issue subpoenas and subpoenas duces tecum, take depositions, and issue written discovery requests to the parties, investors, family members of Defendants, business associates of Defendants, and other witnesses in and through

the pending case of *Oklahoma Department of Securities v. Marsha Schubert, et. al.*, Logan
County District Court, Case No. CJ-2004-256.

CONCLUSION

In light of the facts presented and to ensure the equitable administration of the
receivership, Plaintiff respectfully requests that this Court amend the Order Appointing Receiver
for the reasons stated.

Respectfully submitted,



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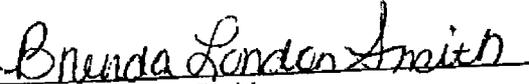
CERTIFICATE OF MAILING

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

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Brenda London Smith
Paralegal

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(Thereupon, the following proceedings were had on the 18th day of July, 2005, to-wit:)

THE COURT: We're on the record in the case Richard LeBoeuf versus Gungoll, Jackson, and Collins, Case No. CJ-2005-3299 which has been consolidated with the case styled Oklahoma Department of Securities versus Robert Mathews, et al, Case No. CJ-2005-3796. Pending before the court today is defendant's motion to dismiss plaintiff's petition, or alternatively for change of venue, which was filed by David Bryant on behalf of I think it was 50-some different defendants. And I know that there were various defendants that have adopted this motion to dismiss.

And then I also have pending before the court today defendant James Powell as well as Jamie Walker Glover's motion to sever and objection to jurisdiction which was filed by Mr. Heggy. It's my understanding also that various defendants have adopted that particular brief. If I can have counsel approach and announce their appearances for the record, and if, in particular, you can tell me if you have adopted the briefs that were filed either by Mr. Bryant or Mr. Heggy.

MR. BEDNAR: Your Honor, Alex Bednar, counsel for Richard LeBeouf. We have adopted the motion by Mr. Bryant, and we have also supplemented it in our answer with a couple of points of law and an affidavit.

1 MS. CORNMESSER: Your Honor, I'm Amanda Cornmesser
2 with the Department of Securities.

3 MR. DAVENPORT: Bradley Davenport on behalf of the
4 plaintiff/receiver.

5 MS. STUCKEY: Gerri Stuckey with the Oklahoma
6 Department of Securities.

7 MS. HALL: Melanie Hall, Oklahoma Department of
8 Securities.

9 MR. BRYANT: David Bryant and Lisa Mueggenborg,
10 counsel for defendants moving to dismiss.

11 MR. MATTINGLY: Jack Mattingly for three
12 defendants: Kathleen Gibson, Ella Carr, and Janice Fagg.
13 And I have adopted the motion to dismiss filed by Mr.
14 Bryant.

15 MR. HEGGY: Your Honor, Ron Heggy for Powell and
16 Glover motions to sever.

17 MR. PRITCHETT: Your Honor, Ed Pritchett for Frank
18 Ward, Alice Sue Ward, Josephine Ward, Todd Ward, and
19 Chester Weems, and I have adopted Mr. Bryant's motion.

20 THE COURT: Thank you.

21 MR. KORDELISKI: Your Honor, Terry Kordeliski. I
22 represent John and Carolyn Pumphrey, and I have adopted Mr.
23 Bryant's motion to dismiss.

24 MR. AGEE: I'm Brett Agee representing Bobbie
25 Proctor. And we would like to orally join in the pending

1 motion.

2 MS. ROZELL: I'm Carolie Rozell. I have adopted
3 the motion to dismiss for defendant Trey Roehrig, Becky
4 Drake, Jerald Drake. And I have also been asked to enter
5 an appearance on behalf of David Trojan who is counsel for
6 Linda Elliott, Regina Howell, and Barry Pollard. They have
7 not filed or joined in any of the motions, but I think they
8 would like to join orally.

9 THE COURT: Thank you. Is that everyone? Okay.
10 Let me ask before we get started: There was a reference
11 made in one of the briefs about a hearing set in August, I
12 think perhaps August 5th, in Logan County before Judge
13 Worthington that perhaps raises the issue of the
14 receivership having been appointed on behalf of investors
15 and creditors. And I could not find anything on the
16 docket. And I think, Mr. Bednar, it may have been you that
17 pointed that out in an answer.

18 MR. BEDNAR: Yes, your Honor. It was an answer
19 filed July 14th. And I brought for the court a copy of the
20 intervention of party and motion to transfer and
21 consolidate the matter filed in Logan County that has been
22 served on approximately 30 different counsel. And in that
23 motion, your Honor, we asked for Judge Worthington to set
24 aside the appointment of receivership until that matter is
25 joined in this case, at least set it aside until the limits

1 of its enforcement can be adjudicated. As you know, my
2 motion for declaratory judgment addressed the
3 enforceability of that order in light of the organic
4 statute the Department of Securities had.

5 And, subsequently, we have supplemented some of
6 those arguments with the fact that there is an underlying
7 administrative ability to resolve this matter outside the
8 court system. The Department of Securities has been filing
9 the majority of briefs, and the receiver has simply been
10 joining in those briefs. This is something that could have
11 all been done administratively. But, nevertheless, if
12 Judge Worthington sets aside his order appointing
13 receivership, this whole entire case itself will likely
14 become moot for lack of standing by the mass action filed
15 in the Department of Securities, and the receiver will
16 become moot for lack of standing.

17 THE COURT: This is the motion that was filed on
18 July 8th that is set for hearing on August 5th?

19 MR. BEDNAR: It is set for hearing on August 12th
20 before Judge Worthington. We have set for hearing in this
21 court on August 5th a motion for discretionary stay pending
22 the transfer of that case and pending the determination of
23 the receivership's propriety.

24 THE COURT: Okay. Thank you. Mr. Bednar, are you
25 asking for the -- for Judge Worthington to set aside his

1 order for receiver both for the company Schubert and
2 Associates and Marsha Schubert as well as the portion of
3 the order that appoints a receiver on behalf of the
4 investors and creditors?

5 MR. BEDNAR: Yes, your Honor. I believe the
6 receivership was created by judicial order I believe on
7 December 4th. And a copy of it was sent to a lot of -- to
8 my client as well as I believe the other clients and the
9 defendants in this class action, and that's the order that
10 we're referring to. It was a second order, the first one
11 was apparently done ex parte. And neither the first order
12 or the second order were actually heard in court. None of
13 the investors were noticed, or alleged investors. And
14 there really hasn't been an opportunity to discuss with the
15 Department of Securities or with any court whether the
16 appointment is appropriate and the actual limits under
17 statute of such an order.

18 THE COURT: Okay. Have you been granted leave to
19 intervene in that lawsuit yet, or is that part of what this
20 motion is also -- to be granted leave to intervene?

21 MR. BEDNAR: Granted leave in Logan County?

22 THE COURT: Yes.

23 MR. BEDNAR: I filed a motion to enter in Logan
24 County and a motion for intervention of right.

25 THE COURT: And that will be heard on your ability

1 to intervene and then to raise the issue with regarding the
2 receivership?

3 MR. BEDNAR: Yes, your Honor.

4 THE COURT: Okay. Thank you, Mr. Bednar. Let
5 me -- I first want to deal with the motion to dismiss or
6 change venue that was filed by Mr. Bryant and Ms.
7 Mueggenborg. Which of you are going to argue that?

8 MR. BRYANT: I'm going to take the lead, your
9 Honor.

10 THE COURT: Okay. Mr. Bryant, if you would,
11 please. It's my understanding that you basically are
12 arguing that there has been a failure to state a claim
13 relying heavily on the Johnson case that was the Colorado
14 case that indicated the receiver could not garnish or could
15 not go after the assets of the individuals. And I would
16 like to hear from you particularly with regard to that
17 argument how you distinguish, or if you agree, that that
18 case is distinguishable from a fact situation such as the
19 one here where the receiver was also appointed for the
20 investors and creditors, and how you think the Johnson
21 case, which it's my understanding in the Johnson case it
22 was just a receiver with regard to the corporation and not
23 with the investors and creditors, and whether you think
24 that does, in fact, make a difference.

25 It's also my understanding that you're asking that

1 venue be changed with regard to the real property, that you
2 do not I guess agree that Section 132 should apply. And my
3 question to you on that that I would like for you to
4 address, Mr. Bryant, Section 132 is the one that indicates
5 that you can bring an action where it's -- where the
6 property is located unless you're not seeking to recover
7 possession. And I would like to know from you if you think
8 in this particular case whether you think the Department of
9 Securities and the receiver are doing anything more than
10 asking me to impress the lien as opposed to just to
11 foreclose the lien which would, in fact, give them
12 possession I guess through the ability to do the sheriff's
13 sale. And I would like to hear your comments with regard
14 to that.

15 The forum non conveniens, there wasn't anything, I
16 mean, that was a pretty straightforward argument. Then you
17 also had argued that you thought that the receiver didn't
18 have any standing to assert these claims and, again,
19 because there was no injury in fact. And I thought a lot
20 of that was going to hinge on whether the appointment for
21 receiver because -- for the investors and creditors makes a
22 difference in your mind with regard to the standing
23 argument.

24 Then you also were arguing that the Department of
25 Securities did not have standing because they were not

1 alleging some sort of violation. It's my understanding the
2 Department's response to that is that the Department is
3 enforcing a public policy argument. There were a couple of
4 cases cited with regard to that and that they are,
5 therefore, a necessary party. In particular with regard to
6 that, I would like to know with these issues that I have
7 raised, these are also the issues that I would like for the
8 Department to respond to because those are the issues that
9 I saw a lot of this coming down to.

10 So, Mr. Bryant, if you would please proceed.

11 MR. BRYANT: Thank you, your Honor.

12 THE COURT: Let me say to just save a little time:
13 You both had quoted to me or cited to me the cases with
14 regard to the motion to dismiss, and I understand my burden
15 is that I would have to find that the Department or the
16 receiver couldn't under any circumstances or beyond any
17 reasonable doubt could I find any facts that would support
18 the claims of the Department or the receiver. So I
19 certainly understand the burden that is on the defendants
20 at this point on the motion to dismiss.

21 You may proceed, Mr. Bryant.

22 MR. BRYANT: Thank you, your Honor. Just
23 preliminary as a background again, I think the court is
24 aware, but this is a situation where several persons are
25 investing with national brokerage firms through their

1 registered agent Marsha Schubert. I think it's very
2 pertinent and critical that the court should be aware that
3 Ms. Schubert is an unincorporated sole proprietorship. She
4 is merely a DBA, not a corporation. In the case that we're
5 bringing here, it is our position that these investors to
6 begin with, your Honor, as alleged within the petition,
7 were innocent unwitting victims of a classic Ponzi Scheme.
8 They have no wrongdoing on their part, and there has been
9 no allegation to that effect.

10 We then learned that a receiver is appointed for
11 Ms. Schubert and, of course, we're glad to hear that
12 thinking that he can maybe ferret out her assets to assist
13 these claims. The next thing that we learn is we wait to
14 find out that he has now been appointed a receiver for us
15 without prior notice to us and without any consent. If
16 there's any underpinning to our judicial system, your
17 Honor, before anyone's rights are affected one way or
18 another, we believe it is that of prior notice. That's set
19 out as early as in our law school days in Mullins v.
20 Hanover Trust.

21 It's discussed in these cases that we cited for
22 authority, and I don't believe it's the kind of thing that
23 can be overlooked in terms of how they got them to where
24 they are now in order to make these claims. I bring to the
25 court's attention on that regard the Freeman case cited

1 within our brief which states, among other things, that
2 although a receivership is typically created to protect the
3 rights of creditors, the receiver is not a class
4 representative for creditors and receives no general
5 assignment of rights from creditors.

6 I think it should follow that without him having
7 put us on notice and drawn us into court and given us an
8 opportunity to argue whether or not he should assert our
9 own held individual rights, if any, as against each other
10 for who got paid and maybe who didn't get paid, I think it
11 fails automatically for that reason.

12 THE COURT: Mr. Bryant, do you think that this
13 court is the appropriate place to make that determination
14 of whether or not the receivership should be set aside with
15 regard to the investors and creditors for lack of notice,
16 or is that an issue that should be raised before Judge
17 Thompson or the appellate courts?

18 MR. BRYANT: Our position, your Honor, is that the
19 authority given in Oklahoma makes it clear also in our
20 briefing that notice must be provided. No one is disputing
21 that they were not given proper notice. This court has
22 authority to make a ruling on that basis. For if there was
23 not proper notice then any court, including Logan County,
24 has been deprived of jurisdiction to act as it did. I
25 don't believe you're asking to overrule a decision of Logan

1 County. I think you can make the initial ruling that this
2 case was never initiated appropriately and, therefore,
3 subject to dismissal.

4 Now, with regard to the Johnson case, in fairness
5 to the court and to the parties, we want the court to know
6 that federal court decisions arising out of state law are
7 not necessarily controlling on this court. We do
8 understand that federal law, as discussed in federal cases,
9 is usually given comity by the state courts. But the
10 reason the Johnson case was cited, your Honor, to begin
11 with, Oklahoma has no such case. And we believe the reason
12 it doesn't is that the statute, and the one under which the
13 Securities Department has tried to initiate this action, is
14 devoid of any authority allowing them to have a receiver
15 appointed to step into the shoes of the innocent investors
16 rather than the mere wrongdoer Ms. Schubert. I believe
17 that's why there are no cases.

18 Well, when we found Johnson we found not only was
19 it sound reasoning, but it is identical to our case.
20 Interestingly, the Johnson case arises from an individual
21 being put into receivership and the funds that he set up.
22 There is no corporation in the Johnson case. What you're
23 going to find from the decisions that the plaintiffs have
24 cited, the other district decisions, is that those pertain
25 to instances where a receiver was appointed for a

1 corporation or other separate legal entity from that of a
2 sole proprietorship for the purpose of seeking the assets
3 of the corporation, found that even though there was an
4 individual wrongdoer operating within that corporation,
5 once the corporation was put into receivership, the
6 corporation was cleansed of the acts of the wrongdoer. And
7 that is to say our assets, our corporate assets, money came
8 in because these investors were investing in us.

9 Our assets are what were depleted and taken, so a
10 receiver was appointed, and rightly so, to go seek back
11 their assets. In this case, your Honor, Marsha Schubert
12 never had any assets. At all times the assets involved
13 were our individual assets being invested to our knowledge
14 with the brokerage firms through her as their registered
15 agent. It follows that with the receiver being appointed,
16 her receiver, he stands in the shoes of Ms. Schubert and
17 Ms. Schubert alone. And that's where it stops, and that's
18 where it should end.

19 Now, our cases -- I know the court has read our
20 briefs and I won't burden you with a recitation of
21 everything involved but, once again, in our reply brief
22 Oklahoma clearly holds it is well said that a receiver
23 simply holds property coming into his hands by the same
24 right and title as a person for whose property he is
25 receiver. Ms. Schubert never had any property. We never

1 gave -- we never invested in Ms. Schubert. We invested in
2 so-called investments to her as the operating agent for the
3 brokerage firms.

4 She merely took the money and shuffled it around
5 under a classic Ponzi Scheme, getting some money out to the
6 early investors and, obviously, no money to the later
7 investors. That's a classic Ponzi Scheme. That's the way
8 it's always going to work. It is always going to hit high
9 center and somebody is going to come up short. But as
10 Johnson stated, your Honor, it's very difficult to sort out
11 a case like this once it has occurred. For example, it
12 says:

13 "Many people may have spent the money on education or
14 other reasons."

15 We know what has happened here. People were given
16 money, told they still had money, others were told their
17 money is in the bank. People go on with their life, they
18 make changes, things occur that are irreversible in that
19 sense. In Johnson, Judge Matsch took the position that
20 there's no one less deserving of making a claim against the
21 investors than the receiver because he only stands in the
22 shoes of the receiver -- of the party for whom which he is
23 receiver.

24 Now, in this instance, I believe they saw the
25 defect in what they wanted to do, and they went in and they

1 obtained an ex parte order without notice to us determining
2 them to be the receiver over our lives now. And,
3 therefore, they think they're going to go balance the cook
4 books of Ms. Schubert, scrape a few dollars out, throw how
5 many into bankruptcy, and then maybe get some form of a
6 distribution out on a very reduced amount.

7 It's only going to heap further harm in my
8 opinion, your Honor, upon an already tragic situation. The
9 crux of the basis for them not being able to do this is
10 that their statute, 1-603 under Title 71 allows them to
11 seek remedies against wrongdoers. It does not speak to the
12 ability to seek claims as against innocent parties, and we
13 don't know any authority that gives support to that.

14 THE COURT: Mr. Bryant, how would you distinguish
15 the Wing case that was cited by the Department and the
16 receiver where the court held that a receiver could be
17 appointed for the benefit of the creditors and asset
18 equitable claims? And I think in that case the creditors
19 on their own have initiated their own lawsuit, and the
20 court said that even with their own lawsuit pending that
21 the receiver and the -- I guess there would be some sort of
22 accounting in the end in the event they recovered in the
23 individual lawsuit, and then the receiver recovered on
24 their behalf. How would you distinguish the Wing case?

25 MR. BRYANT: Your Honor, I don't have that in

1 front of me. I might ask Ms. Mueggenborg to look that up.
2 I do want to bring to the court's attention that Wing was
3 an anomaly in our opinion in that it acknowledges that the
4 bankruptcy cases are not directly on point; however, it
5 extrapolates the bankruptcy law thinking it can use that as
6 a guidance to show equivalent value in order to pursue a
7 fraudulent conveyance action. I believe that they were
8 stretching and looking for a result rather than having it
9 under a pending authority to support.

10 THE COURT: And I also would, just for the record,
11 note that the court also understands that -- realizing that
12 this is, first of all, a federal case and not binding on
13 this court, this was also an unpublished I think federal
14 case.

15 MR. BRYANT: Do you mind if Ms. Mueggenborg makes
16 a comment on that?

17 THE COURT: No. Please. Please. Go ahead, Ms.
18 Mueggenborg.

19 MS. MUEGGENBORG: I think that the Wing case,
20 again, deals with the separate legal entity which is a
21 limited liability company. And if you look at the case of
22 Scholes, which basically states that a receiver can bring
23 an action on behalf of the company only, I still think that
24 you remove the wrongdoer. It's been said over and over and
25 over when you're dealing with, you know, the sole

1 proprietorship or sole proprietor that the receiver,
2 whoever that might be, steps into the shoes of the
3 wrongdoer.

4 And that is, you know, that's US Supreme Court
5 language in the Freeman case that Mr. Bryant was just
6 talking about. So I think the fact that there is a
7 separate legal entity in Wing cleanses the wrongdoing and,
8 therefore, maybe that's why the court allowed that to go
9 forward. But if you look at the other cases cited by
10 plaintiffs, again, you're dealing with separate legal
11 entities, and the Scholes' analysis gives the court,
12 although it's not cited in Wing, the Scholes' analysis is
13 cited in other district courts that the plaintiffs rely on
14 for the proposition that when you have a separate legal
15 entity it cleanses the wrongdoing. It removes the
16 wrongdoer from the equation.

17 So although I guess in Wing they were able to
18 bring claims on behalf of investors, creditors, you still
19 are dealing with an innocent party, a legal entity.

20 THE COURT: Being that the limited liability or
21 the limited partnership, whatever it was in that case, was
22 a separate legal entity from the individual that
23 perpetrated the fraud?

24 MS. MUEGGENBORG: That's correct.

25 MR. BRYANT: Correct. And, your Honor, that is

1 the point of distinction we believe with the cases that the
2 plaintiffs are relying upon. All of those instances of
3 appointed receivers dealt with entities qua entities.
4 That is entities in and of themselves separate and apart
5 from this wrongdoing. In Johnson, for the example and open
6 guidance to the court, even though not compelling
7 authority, is identical to our case. We have merely a sole
8 proprietorship, an individual doing what was done here that
9 caused the harm.

10 THE COURT: But doesn't Johnson specifically
11 say -- and I read from it. It says:

12 "It should be emphasized that if the receiver is not
13 asserting the rights or claims of any investors, and
14 that the distribution is not to be made to a class of
15 investors."

16 Doesn't that distinguish the Johnson case from our
17 situation? Let me ask this, Mr. Bryant: Do you agree that
18 in order to -- for me to follow what your argument is, the
19 first thing I would have to do is to determine that because
20 of no notice the receivership with regard to the investors
21 and creditors doesn't exist, and that your argument is
22 applicable if I go through the first hurdle and make the
23 determination that the receivership with regard to the
24 investors and creditors should be voided for some reason?

25 MR. BRYANT: I agree with that. And I add to it,

1 your Honor, that the court should take into account that
2 71 OS 1-603, the authorizing statute for the Department,
3 does not permit it to go beyond seeking wrongdoers. And if
4 it cannot do that, then it can't even rise to the level of
5 saying, Oh, by the way, we also want this receiver to have
6 extended powers to seek innocent parties.

7 THE COURT: Let me ask before you go further, Mr.
8 Bryant, of the Department of Securities, do you-all agree
9 with the analysis that Mr. Bryant has put forth that if
10 there was not a receiver appointed for investors and
11 creditors that as a receiver just for Marsha Schubert you
12 would not be able to go after the individual creditors and
13 investors?

14 MS. CORNMESSER: I think that's correct.

15 THE COURT: Thank you. Go ahead, Mr. Bryant.

16 MS. MUEGGENBORG: Can I address the court, your
17 Honor?

18 THE COURT: Yes.

19 MS. MUEGGENBORG: When you were talking about the
20 distinguishing factor in Johnson, and the fact that claims
21 had not been brought by individual investors, in Chosnek,
22 which actually cites Scholes which is put on by the
23 plaintiffs, in that case an individual investor was made a
24 plaintiff. And the court states that that investor is
25 going after that investors' money.

1 THE COURT: Is this the Scholes case that you're
2 talking about now?

3 MS. MUEGGENBORG: Yes. It's Chosnek versus Rolley
4 which cites the Scholes case. And it's at 207, in the
5 fifth footnote, looks like middle of the first -- well,
6 actually the middle of the fifth footnote. Basically, Funk
7 was a defrauded investor who was going after his own money
8 in that case, he was also a plaintiff. And it states that
9 the -- that it would be highly doubtful that the receiver
10 would have standing to go after that defrauded investors'
11 money, however, that the receiver did have standing to go
12 after the corporation's assets.

13 THE COURT: Again, are you citing me the Chosnek
14 case or the Scholes case?

15 MS. MUEGGENBORG: Chosnek.

16 THE COURT: What is that case cite again?

17 MS. MUEGGENBORG: That was included in
18 plaintiff's --

19 MR. BRYANT: It's in their response brief, your
20 Honor.

21 MS. MUEGGENBORG: Right. In the plaintiff's
22 response brief.

23 THE COURT: Okay. Thank you.

24 MR. BRYANT: So, your Honor, let me add, if I may,
25 that because we don't see cases like this around here is

1 because there is no specific authority for it. We also
2 note that the cases that they relied upon were often driven
3 by specific statutory schemes such as the bankruptcy code
4 and the federal securities law. We're talking about
5 Oklahoma security statute which does not have any such
6 language allowing them to pursue any equities beyond
7 chasing the wrongdoer. And we were talking about Chosnek,
8 and it is referred to -- or talking about Chosnek and --

9 THE COURT: That's a state court opinion, right?

10 MR. BRYANT: Which one?

11 THE COURT: The Chosnek case was the state court
12 opinion?

13 MS. MUEGGENBORG: Yes. Court of Appeals of
14 Indiana.

15 MR. BRYANT: Indiana. Then with regard to
16 Scholes, your Honor, which is relied on by both sides
17 because Scholes does stand for the principle which we have
18 found that it's the well-known legal principle that a
19 receiver can bring only those claims belonging to the
20 entity it represents and cannot bring claims on behalf of
21 third parties. This is why the receiver had to run back in
22 to get the ex parte order to try to reach into our own
23 pockets and try to balance what we think will never be
24 balanced.

25 So we bring to the court's attention that with

1 regard to the Scholes' decision in its Federal Court of
2 Appeals citation, at 56 F.3rd 750, it goes on to note
3 specifically:

4 "We can find no cases in which a receiver for a sole
5 proprietorship would cover a fraudulent transfer."

6 We believe they are limited to being the receiver
7 for Marsha Schubert. And as a result, it cannot reach
8 beyond anything that it can get other than what are her
9 assets because she has no assets which were ours to be
10 picked up through any kind of a fraudulent transfer action.

11 THE COURT: Now, in the Scholes case didn't the
12 court ultimately allow the receiver to go after various
13 organizations? There were like five different religious
14 organizations that -- and, again, I will tell you there was
15 some confusion on my part as I was reading these because
16 you both cited different Scholes cases with different
17 cites, and maybe I just spelled them both the same way when
18 I shouldn't. But in the 56 F.3rd 750, didn't the court
19 allow the receiver to go after the individual investor who
20 happened to be some type of corporation or organizations
21 under the Fraudulent Transfer Act? I thought in the
22 Scholes case, the Fed Third case, the Wing case, the
23 Obermaier case, and the Mays case all allowed receivers to
24 go after individual investors. I realize I just popped off
25 a lot of cases.

1 MR. BRYANT: They were allowed to go after
2 individual investors that invested in the company, and
3 receivership was a separate legal entity from an
4 individual.

5 THE COURT: Which goes back to your argument that
6 because all of those involved entities as opposed to an
7 individual?

8 MR. BRYANT: Right. They're given a second
9 chance, a cleansing. Because the point is that -- the
10 argument is that it was their assets that were toyed with
11 and utilized in the Ponzi Scheme, and they should have the
12 individual right to try to get those back. Well, we,
13 likewise, would say, your Honor, our assets were toyed
14 with, and if anybody has a right to get those back, we as
15 the investors would like to do that. Let the investors sue
16 between themselves, those who did not against those who
17 got, and see how that sorts out. But even Judge Matsch in
18 his decision says it's not a neat, easy question. He says
19 it's a very difficult problem to figure out what would
20 happen under certain circumstances. So, he said we will
21 just let this case lay and leave it for another day for
22 others to worry about.

23 THE COURT: Thank you.

24 MR. BEDNAR: Alex Bednar, your Honor. With
25 respect to the question as to whether a receiver can

1 represent the rights of investors in a Ponzi Scheme, did
2 the Johnson case -- and the keynote under 5 made the real
3 clear point. Very direct before the memorandum opinion in
4 Johnson says:

5 "Once the fund sent money to an investor pursuant to
6 investment contract, it had no further possessory
7 interest in the money."

8 So whether or not the Department of Securities
9 listed investors in the lawsuit or not, and you asked that
10 a little while ago whether the fact they were listed in the
11 lawsuit distinguished Johnson or not, shouldn't make any
12 difference because the analysis is the same as to whether
13 the receiver can have possessory interest of something that
14 is incorporated and he has already let go of. And with
15 that in regard, I would like to put on the record that
16 that's a unique characteristic of this case. We have the
17 same scenario. We have an unincorporated entity that sent
18 money out, and we're not sure that the receiver has
19 possessory interest over that.

20 With regard to the further question as to whether
21 or not a receiver does have standing to assert claims
22 belonging to investors and the entity, in the -- Richard
23 LeBeouf's response filed, file-stamped on July 14th and
24 joinder in the defendant's motion to dismiss, attachment A
25 is an affidavit from Professor --

1 THE COURT: Just a moment. I think there's a
2 procedural --

3 MR. DAVENPORT: I'm going to object to him
4 mentioning this affidavit unless the defendants are willing
5 to convert this proceeding to one for a motion for summary
6 judgment.

7 MR. BEDNAR: I'm just using it to cite a case, but
8 I will take back the statement.

9 THE COURT: Do we all agree that I'm not going to
10 consider that affidavit? And, to be quite honest, I'm not
11 certain, since it basically goes toward I think the
12 ultimate issue that I as the trier of fact would have to
13 find, that it would be appropriate anyway. But do we
14 agree -- are you not going to rely on the affidavit for
15 today's argument?

16 MR. BEDNAR: Yes, your Honor.

17 THE COURT: Okay. Thank you.

18 MR. BEDNAR: There is a US Supreme Court case, and
19 that is Caplin v. Marine Midland Grace, 406 U.S. 416 that
20 made it very clear. The Supreme Court stated that the
21 receiver does not have standing to assert claims belonging
22 to investors in an entity. Aside from that case there is a
23 Tenth Circuit case in 1983, the Chilcott case -- I'm sure
24 we're all aware -- and then the Johnson case as well --

25 MR. BRYANT: Your Honor, unless you have further

1 questions, I would just conclude at the moment, and we will
2 respond later, if necessary. But as a basic underpinning
3 here the ODS is limited to bringing civil actions only for
4 the enforcement of wrongful acts that they're saying under
5 1-603. Since the receiver obtained his rights through
6 their appointment, he likewise assumes no powers beyond
7 what the ODS could acquire. So we believe the second order
8 obtained ex parte fails for that very reason.

9 And, once again, as Freeman rightly set out, a
10 receiver is not the class representative for the creditors
11 or the investors, and he does not receive a general
12 assignment of their rights. So unless he can be given
13 specific authority under proper statute in order to do what
14 he's doing, this was merely an imaginative act to try to
15 right some wrongs whether it be wise or not.

16 THE COURT: Let me ask, Mr. Bryant, with regard to
17 the Department's ability to bring this act, the cases that
18 were cited by the Department, it was SEC versus Egan,
19 E-G-A-N, where they cited it for the proposition that the
20 SEC in that particular case was enforcing the public policy
21 and, therefore, they could act on behalf of defrauded
22 creditors. My question to you is: How do you distinguish
23 those two SEC cases? The other one was SEC versus Cherif,
24 C-H-E-R-I-F.

25 MR. BRYANT: Your Honor, the SEC has specific

1 statutory authority to pursue other equitable claims, but
2 our research of the history, and we would like an
3 opportunity to respond further on that if necessary, is
4 that it still pertains to the seeking of wrongdoers beyond
5 the initial party that is considered to be in violation.
6 Secondly, the SEC -- excuse me just a moment. I have lost
7 my thought on that.

8 THE COURT: Well, let me ask, and I have read so
9 many cases I may just not be remembering correctly, but on
10 both of these SEC cases I don't remember that the SEC was
11 relying upon any particular statute that gave them the
12 authority that sort of under this general, we have a duty
13 to protect the public interest and, therefore, that's the
14 method that they were using. Are you telling me you think
15 there was a specific statute in both of those cases?

16 MR. BRYANT: Your Honor, I may be wrong on that.
17 There is a specific statute involved, but let me stand
18 corrected on that. Let me just react in this fashion:
19 There is no stated public policy within our statute
20 supporting the argument the ODS is bringing this action on.
21 I think that if we would review the federal statutes
22 compared to the state statutes, the Securities Department,
23 the federal is much broader and has been developed much
24 further, and it just simply is not within the language of
25 our statute.

1 Any other point, Ms. Mueggenborg?

2 MS. MUEGGENBORG: I guess back to what Mr. Bryant
3 said that this is really a state law issue and that
4 basically SEC obviously follows federal law. I did look at
5 the SEC statute 78 U and looked into the legislative
6 history to look at the purposes. And if we do want to look
7 at the SEC cases cited by plaintiffs, we would like an
8 opportunity to further brief the issue because that
9 legislative history talks about allowing the SEC broad
10 enough powers to seek wrongdoers. I mean, that's the
11 purpose, that is the legislative intent.

12 And that I believe was enacted, the equitable
13 relief provision in the SEC I believe was in 2002. These
14 are 1991 and 1993 cases. You know, maybe the US Congress
15 is now speaking to, you know, let's focus on the
16 wrongdoers. We would just like an opportunity to brief
17 that if we're going to get into those cases.

18 MR. BRYANT: Your Honor, I now remember what I
19 wanted to mention. It's actually in my brief. But I'm
20 referring to our reply brief, and it would be found on page
21 2 and 3 for the court at later reference. But it goes to
22 the issue that the plain meaning of the statute's language
23 is conclusive except in a rare case when literal
24 construction produces a result demonstrably at odds with
25 the legislative intent. It goes on to state, and I believe

1 this goes to the public policy issue, and this is with all
2 due deference and respect to the court, but it is said:

3 "The court has no authority to rewrite the enactment
4 merely because it does not comport with the court's
5 view of prudent public policy."

6 And we don't see any public policy in the prior
7 statute in Oklahoma or the present statute, and certainly
8 no cases out there that are supporting what we consider to
9 be its overreaching of authority.

10 THE COURT: Thank you. Do any of the other
11 defense counsel have anything they would like to add on
12 this argument?

13 MR. BEDNAR: I would, your Honor. I think the SEC
14 has jurisdiction when registered securities are at stake.
15 Under the Department of Securities' pleadings, like I say,
16 these are unregistered securities, so this would be a state
17 cause of action; therefore, we do have to look at the
18 organic statute and look at the case law precedent and
19 anything in the state of Oklahoma that gives us guidance as
20 to what we need to do in this case.

21 THE COURT: Anything further from defense counsel?

22 MR. MATTINGLY: Jack Mattingly on behalf of my
23 three defense clients, I incorporate all of the defense
24 arguments made here.

25 THE COURT: Anything further? I'm assuming

1 you-all also were incorporating all the arguments that were
2 made here today?

3 MR. HEGGY: Actually, your Honor, no, I have not
4 joined the motion to dismiss. I have a motion to sever
5 pending.

6 THE COURT: That's correct, Mr. Heggy. Mr.
7 Pritchett.

8 MR. PRITCHETT: Your Honor, Ed Pritchett, and I
9 join in the motion which was presented.

10 THE COURT: Okay. Thank you. Who is going to
11 speak on behalf of the Department or the receiver? Who is
12 going to go first?

13 MS. CORNMESSER: The receiver is going to go
14 first.

15 MR. DAVENPORT: Your Honor, Brad Davenport on
16 behalf of the plaintiff/receiver. One of the first items
17 that you asked the parties to address was the facts of the
18 Johnson case and how that was distinguishable both from the
19 instant case. And if I understood counsel correctly,
20 defendants' position is that the facts in that case are
21 identical to the ones that we have before the court today.
22 And, your Honor, that's just simply not true.

23 The Johnson case itself on the first page of that
24 case opinion states that James Johnson was appointed equity
25 receiver from Chilcott Commodities Corporation, Chilcott

1 Portfolio Management, Inc., and Thomas D. Chilcott;
2 therefore, that is not the same factual scenario we have in
3 the case before this court. The receiver was appointed as
4 receiver over the corporations and not as an unincorporated
5 association as the defendants have suggested.

6 THE COURT: Let me ask: Wasn't the last one, the
7 Thomas D. Chilcott, wasn't that doing business as Chilcott
8 Futures Fund?

9 MR. DAVENPORT: Yes, your Honor.

10 THE COURT: So isn't that the same situation that
11 we have here?

12 MR. DAVENPORT: It's two corporate entities and
13 individual doing business as the Chilcott Fund.

14 THE COURT: Mr. Davenport, how do you -- it
15 appeared to me that the argument was being made by Mr.
16 Bryant that this particular case is distinguishable, our
17 case today, because we're dealing with an individual and
18 doesn't have the protection of a corporate asset, and that
19 he was indicating in the various cases that you-all cited
20 to distinguish Johnson that in each and every one of those
21 cases it didn't involve an individual who the receiver was
22 being appointed -- the individual being the wrongdoer for
23 lack of a better word -- that they each involved
24 corporations and, therefore, the court somehow in those
25 cases found a distinguishing feature because the wrongdoer

1 really wasn't the corporate entity.

2 MR. DAVENPORT: That's accurate, your Honor. And
3 I have no dispute with that whatsoever. The problem is is
4 that the defendants don't want to distinguish then when a
5 court has actually appointed a receiver expressly for -- it
6 doesn't matter whether it is an individual or a corporate
7 entity, investors and creditors. They refuse to make that
8 distinction. That distinction is one that doesn't exist in
9 the Johnson case, as I just pointed out, because the word
10 corporate entity is there.

11 They're right. These cases that the
12 plaintiff/receiver cites in its brief does address
13 corporate entities. And, again, that underlying principle
14 that Mr. Bryant stated here just a few minutes ago that the
15 receiver can only bring causes of action on behalf of the
16 entities or persons for whom he or she is appointed, well,
17 it's as clear as can be from a district court of Logan
18 County, December 10, 2004, order that that court expressly
19 appointed Mr. Jackson as the receiver for the investors and
20 creditors of Schubert and Associates; therefore, that
21 court's order is directly in line with those case opinions.
22 Mr. Jackson as a receiver is only acting in this lawsuit on
23 behalf of those persons for whom he has been appointed
24 receiver.

25 Furthermore, your Honor, in talking about the

1 presence or absence of law on the subject in the state of
2 Oklahoma, one of the last things that opposing counsel
3 recited in argument was that the plain meaning of the
4 statute's language is conclusive. Well, I would direct the
5 court's attention to Title 12, Section 1554, that
6 specifically allows a receiver standing to bring an action
7 to his or her own name on behalf of the entities that he is
8 charged with.

9 THE COURT: Let me ask: Wasn't the statute that
10 he was relying upon the statute that had to do with what
11 the Oklahoma Department of Securities had the authority to
12 do and that they were limited? And, correct me if I'm
13 wrong, Mr. Bryant, but to sort of summarize your argument
14 that the Department of Securities is limited to pursuing
15 wrongdoers, they're not alleging any of these individual
16 defendants are wrongdoers, and that the receiver's
17 authority can go no further than what the Department of
18 Securities can do.

19 MR. DAVENPORT: I would agree that that was the
20 defendants' argument, your Honor, but I don't know of any
21 basis to support that argument. There are all kinds of
22 statutes for the appointment of receivers, whether it's in
23 the context of an insurance company under Oklahoma's
24 insurance statutes or whether it's under the General
25 Corporation Act. And once a receiver is appointed, whether

1 it's under the General Corporation Act or if it's under the
2 Oklahoma Securities Act that we have here, there is a set
3 of statutes that Oklahoma has in Title 12 that governs then
4 the conduct of those receivers.

5 Even if the court looks at Title 71, the section
6 to which counsel has referred, there is nothing in there
7 that states that the receiver is subject to any of those
8 provisions. The court may address that differently as to
9 the Securities Department itself and the actions it takes
10 through its administrator, but it does not limit that type
11 of relief in terms of whether the person is a wrongdoer to
12 the receiver. Rather the receiver, once appointed, is an
13 officer of the court, particular hearing in Logan County,
14 and is subject to these general statutes in Title 12.

15 Furthermore, I just draw your Honor's attention,
16 talking about Title 71, Section 1-603. There in part B(2)
17 it talks about the appointment of a receiver or
18 conservator, and it says for the defendant or the
19 defendant's assets. What the defendants don't want to
20 acknowledge then is part B(3) that says that the court may
21 also order such other relief as the court considers
22 appropriate. That gives the court, such as the district
23 court of Logan County, wide latitude as far as the power
24 and authority that the court can give to a receiver like
25 Mr. Jackson in this instant case.

1 THE COURT: Do you -- what provision is it of the
2 first subpart A of that do you -- that's good news. My
3 pretrial scheduled for four has been continued and so we
4 have more time. Under subpart B I took it that those were
5 the different remedies that the Department has. The last
6 one being obviously very broad, any other relief the court
7 deems appropriate. Do you believe that under subpart A
8 that there has to be some sort of unethical act or
9 violation of the act or taking some sort of action that
10 aids someone else in violating the act? I guess simply
11 put, do you think subpart A still requires some sort of
12 wrongdoing before you can get to subpart B?

13 MR. DAVENPORT: Not as to the receiver. I think
14 these are situations that must occur in order for the
15 administrator of the Oklahoma Department of Securities to
16 initiate these types of relief that are listed below in
17 this statutory section. In other words, unless and until
18 the Oklahoma Department of Securities and administrator
19 shows such types of activity in this case on Marsha
20 Schubert individually and doing business as Schubert and
21 Associates, then it would not trigger the types of relief
22 that are available then under part B.

23 THE COURT: Just the wrongdoing of Marsha Schubert
24 is enough to invoke this statute, and then you fall under
25 the remedy section, part B is your argument?

1 MR. DAVENPORT: Yes, your Honor.

2 THE COURT: And included in that can be an
3 appointment for the investors and creditors?

4 MR. DAVENPORT: Yes, your Honor.

5 THE COURT: Let me ask this: How does a receiver
6 handle when you have got -- if you're appointed as the
7 receiver for the investors and creditors, how do you act on
8 behalf of -- I just keep thinking is this not a conflict
9 situation for the receiver? You're appointed as receiver
10 on behalf of all the investors, but yet you're trying to
11 take from some investors to give to other investors. Is
12 that not some sort of conflict situation for the receiver?

13 MR. DAVENPORT: Your Honor, as pointed out in the
14 initial response of I think both the plaintiff/receiver and
15 the Oklahoma Department of Securities, I mean, many of
16 these people are not investors at all. When I'm talking
17 about investors, I'm talking about investors of Schubert
18 and Associates. This is a distinct investment program that
19 Marsha Schubert pitched to some of her other securities
20 clients that were investing with her through AXA Advisors
21 and through Wilbanks Securities. She went to some of the
22 existing clients that she already had and pitched to them
23 this new investment program of Schubert and Associates. It
24 was not a related entity.

25 She was promising these people in some cases up to

1 a 30 percent annual return. As stated in the plaintiff's
2 briefs and response, a large number of the ones that are
3 represented at least in Mr. Bryant's client pool, most of
4 those were not investors at all. In other words, if you
5 look at exhibit -- I think it's Exhibit B to
6 plaintiff/receiver's response -- and you look at the
7 money-in column and you start going down through the list
8 of defendants, third parties in this motion to dismiss, and
9 the majority of those relief defendants paid no money into
10 Schubert and Associates but for some unexplained reason
11 they got money out of Schubert and Associates. So in that
12 sense, your Honor, the plaintiff/receiver does not believe
13 that there is a conflict of interest. You know, the
14 receiver is not --

15 THE COURT: Isn't the receiver also seeking monies
16 from certain investors that did invest something and just
17 got very large returns for their investments?

18 MR. DAVENPORT: A small number of those do exist,
19 your Honor.

20 THE COURT: So is the receiver just acting as the
21 receiver for those investors that fall within this category
22 of a creditor type investor? Because I have to admit, I'm
23 just puzzled as to who it is the receiver is working on
24 behalf of.

25 MR. DAVENPORT: It's the defrauded investors and

1 creditors.

2 THE COURT: Okay. Anything further, Mr.
3 Davenport?

4 MR. DAVENPORT: Yes, your Honor. One of the
5 things that you asked that counsel address was the
6 alternate motion to change venue. I'm not sure that
7 defendants' counsel even addressed that, but I think
8 clearly under Title 12, Section 132, any time you have
9 either one parcel of property that spans more than one
10 county or you have multiple pieces of property in different
11 counties at issue in a lawsuit, that venue statute states
12 that a suit can be brought in any one of those counties
13 where at least one of those parcels of real property is
14 located.

15 THE COURT: How do you get around the issue -- I
16 mean, because you're asking the court to impose an
17 equitable lien I think it was on four different properties.
18 Someone pointed out to me none of the properties are also
19 located in Logan County, but I think one was in Oklahoma,
20 two in perhaps Canadian, and one somewhere in Missouri.
21 But are you not asking -- because the statute they're
22 relying upon says something to the effect about unless
23 you're asking for possession of the property. Do you
24 distinguish that because you're just asking for a lien?
25 Because would you agree with me I clearly wouldn't have any

1 authority to foreclose any lien? And you're not asking for
2 that relief in this court should a lien ever even be
3 established.

4 MR. DAVENPORT: All the receiver is asking for,
5 your Honor, is the establishment of a lien, not the
6 foreclosure of a lien in this lawsuit.

7 THE COURT: Do you agree that if the additional
8 relief of a foreclosure was being asked that then you would
9 need to initiate a lawsuit in each county where the
10 property is located?

11 MR. DAVENPORT: Yes, your Honor.

12 THE COURT: But because you're only asking the
13 court to establish the lien, in essence give you the
14 mortgage, lien, whatever in the property, because that can
15 only be done by operation of law at this point that that --
16 you're not asking for possession in this action?

17 MR. DAVENPORT: That's correct, your Honor. And
18 the receiver understands it would have to take any such
19 lien and domesticate that in whatever -- whether it's in a
20 different county in Oklahoma or if it's in Taney County in
21 Branson, Missouri, and go ahead and domesticate that
22 judgment and lien and go for any kind of foreclosure
23 proceeding that way. But that's totally separate. I mean,
24 the receiver understands that unless he wins the other part
25 of this case then this whole motion of a lien is not going

1 to be relevant. It's a remedy requested that the receiver
2 wanted to put both the court and the parties on notice.

3 THE COURT: So best case scenario for the receiver
4 would be a court makes a finding at some point, number one,
5 this motion to decide that there's been unjust enrichment
6 or fraudulent transfer, court then establishes a lien, and
7 then you would be on your own to go pursue whatever rights
8 you have under that lien, but it's basically a two-step
9 process?

10 MR. DAVENPORT: Yes, your Honor. That's also --
11 for that reason, and this Title 12, Section 132, that's why
12 the plaintiff/receiver opposes the defendants' request for
13 change of venue and it states that would not be proper
14 because as your Honor stated there is none of these pieces
15 of property located in Logan County. We would have to go
16 where there is at least one parcel of real property in
17 order to have the proper venue, and that is here in
18 Oklahoma County.

19 THE COURT: In the receivership action when I
20 looked at the docket sheet on that, the creditors were all
21 given notice at some point in time to present claims; is
22 that correct?

23 MR. DAVENPORT: Yes, your Honor.

24 THE COURT: And did that include all 158, whatever
25 the exact numbers of defendants were? Was each defendant

1 in this case given notice in the receivership case to
2 present claims?

3 MR. DAVENPORT: Your Honor, I can't stand here and
4 tell you I have cross-referenced those two lists.

5 THE COURT: But the intent was to give them each
6 notice?

7 MR. DAVENPORT: There were over 158 notices of
8 claim sent out. I feel comfortable saying that most if not
9 all of these defendants were included in that process.

10 THE COURT: So are we going to have two cases
11 going simultaneously? And I think it was in the Wing case
12 where the court seemed to find it didn't matter in that
13 case. Are we going to have investors through the
14 receivership trying to be paid, and then through the
15 receivership proceeding in Logan County through the
16 submission of claims attempt to be paid? Is it going to be
17 a situation where there is going to be a double recovery
18 because you're also in this action trying to recover monies
19 for them?

20 MR. DAVENPORT: No, your Honor. Because the
21 receiver is in control of that process. If someone doesn't
22 file a claim pursuant to that claim process of which notice
23 was given with the receiver, then they're, number one, not
24 going to have a claim unless the court allows them to
25 deviate from its previous order. Secondly, all claims have

1 to come through that process. It was sent out by mail. It
2 was published. So it doesn't matter if we had ten cases
3 going. Someone that wants to recover assets from this
4 receivership has to go through that approved process, and
5 the receiver will be the first person to review those
6 claims, make his recommendations, and pass that onto the
7 court in Logan County for final approval.

8 THE COURT: My concern was under the forum non
9 conveniens argument if it would merit any -- to have one
10 judge deciding all of this. And what you're telling me is
11 that this action is basically an attempt to collect funds
12 that would then be distributed through the receivership
13 proceeding in Logan County to whoever it deemed appropriate
14 creditors?

15 MR. DAVENPORT: Yes, your Honor.

16 THE COURT: Anything further?

17 MR. DAVENPORT: No, your Honor. I believe that's
18 all. Thank you.

19 THE COURT: Thank you.

20 MS. CORNMESSER: Your Honor, I am Amanda
21 Cornmesser on behalf of the Oklahoma Department of
22 Securities. I first wanted to state and make sure that I
23 clarify. Earlier when you asked the question about the
24 investors for the receivership, this is not the first time
25 that the Department has gone -- a relief defendant act.

1 There are two occasions in recent memory that we can come
2 up with: The Universal Factory case and the Hickman case
3 both have relief defendants in those.

4 THE COURT: So are you telling me in those --
5 those are two Oklahoma state court actions that you-all are
6 taking this same procedural route that you are taking here
7 having a receiver appointed for the benefit of investors
8 and creditors?

9 MS. CORNMESSER: Yes. And we sued both of th
10 defendants in those cases.

11 THE COURT: Were either of those appealed to
12 Supreme Court, or was the issue of the Commission's at
13 to appoint a receiver for the investors and creditors
14 addressed?

15 MS. CORNMESSER: I don't believe so. I just
16 wanted to reiterate what Mr. Davenport already argued for
17 the Wing case that the receiver in that case was appointed
18 to marshal and preserve the assets for both the entity of
19 the creditors and the investors. What we want to be able
20 to distinguish for you today is that this is not a
21 receivership for the defendants, this is a receivership for
22 the 80-plus defrauded investors that lost over nine million
23 dollars. So there is a separation in the accounting:
24 Those that received funds over and above the amount they
25 gave, and those who have lost funds. So the receivership

1 is there for investors that have lost funds.

2 THE COURT: The language in the order just talks
3 about being a receiver for investors and creditors, right?

4 MS. CORNMESSER: Correct. I think a couple of
5 things that I wanted to address is, I didn't have an
6 opportunity to reply to Mr. Bryant's reply brief, so I
7 wanted to make a few oral arguments about that and also
8 cite a couple of cases that might help clarify the Oklahoma
9 Securities Act, powers under disgorgement. The Supreme
10 Court of Oklahoma has used federal cases as instructed to
11 interpret the federal securities laws that are uniform to
12 the state security laws. We model our security law
13 on federal security laws.

14 In SEC v. Texas Gulf -- and I will get the
15 and give them to you but -- 446 F.2d 1301. The court
16 reviewed whether the SEC had the authority to request
17 equitable remedy. The court held that the SEC may seek
18 other than injunctive relief to effectuate the Securities
19 Act of 1934 as long as the relief is remedial and not a
20 penalty assessment. The Supreme Court of Oklahoma held
21 that nothing in the Oklahoma Securities Act would limit the
22 administrative right to seek equitable relief. That is in
23 State v. Southwest Mineral Energy. That's a 1980 Oklahoma
24 Supreme Court case cited at 617 P.2d 1334.

25 The court stated that disgorgement is a remedy in

1 addition to any and all other remedies both legal and
2 equitable which is available to both the administrative
3 private investors. And the court held that the remedy
4 disgorgement is recognized in this jurisdiction and
5 judges of the state are empowered to employ this remedy

6 THE COURT: In that case was the Department
7 pursuing an action something similar to this against
8 investors who --

9 MS. CORNMESSER: I believe it was seeking
10 defendants to be the wrongdoers in that case. They didn't
11 clarify whether or not they were just limited to the
12 defendants whether it was broader than that. But we wanted
13 to reiterate the goal of the state security regulation is
14 to protect the investing public and to promote the
15 uniformity of federal laws, and that the district court of
16 this state has the power under our statute to determine the
17 relief, and that's what Mr. Davenport stated earlier in
18 1-603. We believe that the court may look at those, the
19 relief that it wants to order. The last thing that I would
20 like to address is --

21 THE COURT: Let me ask this before we move on to
22 your next point: Do you agree with Mr. Bryant's assessment
23 that I can somehow make an order in this case that would
24 have the effect of setting aside or vacating the
25 receivership order that was entered by Judge Worthington?

1 I have to tell everyone that's sort of an initial point
2 that I'm really hung up on is why, to be quite honest, you
3 came to me to do this as opposed to Judge Worthington whose
4 order it is that you're questioning.

5 And they may be very valid arguments, without
6 commenting one way or the other, but the whole issue, Mr.
7 Bryant, that you raised with regard to the Department of
8 Securities' ability, even under Section 1-603 to pursue as
9 an investor or as a receiver on behalf of the investors and
10 creditors. The arguments that you make about Johnson,
11 wanting to distinguish those. I still question
12 procedurally how I would have the authority to basically
13 vacate. And what authority do I have to do anything but
14 follow the order that's been entered by Judge Worthington
15 until he either vacates it on August 12th when it's set for
16 hearing on Mr. Bednar's argument, or in the event there is
17 some sort of appeal as to the order as to whether or not --
18 and I'm still hung up on the procedural aspect of this is
19 what authority do I have to do anything with regard to the
20 receivership that has been appointed?

21 MR. BRYANT: Your Honor, I may have more to say
22 later, but just briefly, we did not bring this matter
23 before you, they did. And that's why we reacted.

24 THE COURT: Okay.

25 MR. BEDNAR: Your Honor, the state statutes

1 require that when I filed my declaratory judgment action I
2 had to file against the department in the county where it
3 resides which is Oklahoma County. Regarding transferring
4 the Logan County receivership issue down here, at the very
5 least if for some reason procedurally that can't happen, we
6 believe that you have the authority to limit its
7 enforceability in Oklahoma County or at least take a look
8 at it to see whether certain parts of it are limited by
9 statute and by case law. But our goal is essentially to
10 have it set aside in Logan County and have the matter
11 transferred down here for final adjudication.

12 THE COURT: I would be -- and let me tell everyone
13 what I'm leaning towards in this case -- is that I'm of the
14 position that as long as the receiver continues to be a
15 receiver for the investors and creditors, that they can
16 do what they're doing now. What I think is the big issue
17 is whether or not they should have been appointed with
18 notice in the first place to you-all's clients. And if
19 in fact, Judge Worthington and/or an appellate court tells
20 that, yes -- and I say Judge Worthington -- if there's not
21 an appeal or some sort of certification as to whatever
22 order he ultimately enters when this issue is actually
23 presented to him.

24 If, in fact, that the order for the receiver to
25 continue to act on behalf of investors and creditors absent

1 an appellate court telling me, no, that order is being set
2 aside, this court has no authority on the -- but to go
3 ahead and proceed with this action. If, in fact, an
4 appellate court or Judge Worthington on his own says I
5 agree under all these different arguments: The no notice,
6 if he has another hearing because of that, if he has
7 another hearing because the statute -- the Department is
8 limited because of their statutory constraints, then I
9 think this case goes away.

10 Because I think you-all are admitting if you're
11 not allowed to proceed, the Department as well as the
12 receiver on behalf of the individual investors and
13 creditors, and if that portion of the order goes away, this
14 entire lawsuit goes away in my court. Do you-all agree
15 with that?

16 MR. DAVENPORT: Plaintiff/receiver would, your
17 Honor. I don't know if the Department of Securities shares
18 that.

19 MS. CORNMESSER: I think we're not in total
20 agreement with that because we have been able to do it in
21 other cases.

22 THE COURT: Where you weren't appointed as
23 receiver for investors and creditors?

24 MS. CORNMESSER: I think that's correct. A
25 receiver was appointed, but not on the language of

1 investors and creditors.

2 THE COURT: I would be harder pressed. I would
3 buy into more of their argument and siding more with their
4 motion to dismiss if you weren't. To me the distinguishing
5 factor here is the fact that you-all are the receiver for
6 the investors and creditors. You're not, the Department
7 isn't, but you-all are basically acting through the
8 receiver, correct?

9 MS. CORNMESSER: No. We don't act through the
10 receiver. We're completely separate. We filed it jointly.
11 I think there still remains some confusion on that.

12 THE COURT: So you're saying if the receiver has
13 dropped out completely you-all think you could still pursue
14 in this action to do those? And that's what these other
15 two cases were that you had cited?

16 MS. CORNMESSER: Yes, your Honor.

17 MR. BRYANT: It's surprising to me they need
18 receiver for support if they think they can do it on
19 own.

20 MS. CORNMESSER: We don't need the support,
21 just a convenience factor that he controls the assets
22 the clients.

23 MR. BEDNAR: And we have a hearing, as you
24 mentioned earlier, on the 5th of August prior to Judge
25 Worthington deciding that issue whether to continue with

1 the receivership or not. We do have a hearing set here in
2 this court for a stay of the receivership and to perhaps
3 remand, either permanently stay the receivership until the
4 issue is consolidated or remand this matter
5 administratively.

6 We have argued all along there is absolutely no
7 need for a receiver. The Department under 71 OS 1-601
8 through 604, has all the administrative remedies to do what
9 this receiver is doing. The assertions that they have made
10 are all things that could have been done administratively
11 that we could be doing right now instead of having these
12 folks hire attorneys to try to figure out what is going on.
13 What has happened in the last month and a half is the
14 receiver has fought all these motions back and forth. I
15 had a big stack of them on my desk when I got to the
16 office, and it's just been billing this account. The
17 Department of Securities has been jointly filing every
18 single motion with this receiver. There is no need for a
19 receivership. So that might be an issue that we can
20 address August 5th to put a stay on the receivership at
21 least temporarily.

22 THE COURT: Ms. Cornmesser, the cases that you-all
23 cited in distinguishing the Johnson case -- because in the
24 Johnson case the court made to me a big point out of the
25 fact that the receiver hadn't been appointed for the

1 investors and creditors. These other cases that you were
2 cited, weren't those all receiver cases too? What case
3 would you cite me to for the authority then -- let's assume
4 the receiver is out of the picture for whatever reason.
5 What is the main case that you would cite me for for the
6 authority then of just the Department of Securities to move
7 along separate and apart from the receiver? Because I
8 thought in all the cases that I had read there was always a
9 receiver. And I have to admit until right now I hadn't
10 looked at that as two separate arguments.

11 MS. CORNMESSER: Egan is one of those.

12 THE COURT: So the two SEC cases that you cited,
13 Egan and then Cherif, whatever that second one is?

14 MS. CORNMESSER: I have to look at that one again.

15 THE COURT: And, Mr. Bryant, is it your position
16 then that whether or not the receiver stays in or out that
17 the Department of Securities should be out?

18 MR. BRYANT: Yes, your Honor. And let me just say
19 once again, we have to rely heavily on its only statute
20 authority which is 1-603. And it goes to the issue of them
21 chasing wrongdoers and for the appointment of that
22 defendant and over that defendant's assets also ordered as
23 the administrator to take charge of control of a
24 defendant's property. We're not the defendant except for
25 what they have concocted through this second order. It

1 only goes to a wrongdoer.

2 And I would suggest that the side cases Ms.
3 Cornmesser has referred to that -- we have done this
4 before. The Hickman case, for example, our best
5 information is those that were pursued were closely-related
6 investors. And, secondly, in the cases that she cited, no
7 one challenged standing.

8 THE COURT: Which I think you-all agreed to that
9 it just wasn't even really raised in that case one way or
10 the other, the whole issue of standing.

11 MS. CORNMESSER: That's correct.

12 MR. BRYANT: And we are, Judge.

13 THE COURT: And it's your position that the
14 Department then under both of the SEC cases, and that once
15 it is going after a wrongdoer such as it went after Ms.
16 Schubert in this case, that at that point in time that
17 under this catch-all phrase that it has the authority to do
18 the disgorgement, and then your reference is the two SEC
19 cases; is that correct? So that's basically your legal
20 arguments as to why the Department of Securities could
21 pursue this case separately even if the receiver for some
22 reason is out because they're no longer the receiver for
23 the investors and creditors.

24 MS. CORNMESSER: That's correct. I just wanted to
25 finish up on the ex parte argument. I think there is some

1 confusion still that remains about the receivership order
2 that took place in December of 2004. At that time, the
3 parties involved in that case were Marsha Schubert, Richard
4 Schubert, and Schubert and Associates. They were the
5 defendants only. We had not done the accounting, we had
6 not completed the investigation. We had no idea who had
7 received funds and who hadn't, so there's no way we could
8 have given notice to anybody. And we didn't have any
9 obligation to give any -- notice anyone other than the
10 defendants, which we did give. It was on OSCN, it was a
11 public hearing, it was on a motion docket, and it was
12 heard.

13 THE COURT: How would one of the individual
14 investors have had any notice of what was going on?

15 MS. CORNMESSER: It was on OSCN for 25 days, and
16 it was on our website which they all had. We had plenty of
17 investor meetings up in Crescent to keep people informed.
18 We did as much as we could. At that time we didn't know
19 who had received monies and who hadn't. So, you know, that
20 was a securities fraud case in Logan County, and we felt
21 like we noticed the appropriate parties at that time. Now
22 we're in a different matter where these are relief
23 defendants who can receive these funds, and it took us
24 months to figure out the accounting.

25 THE COURT: Let me tell you what I'm going to do

1 with regard to the motion to dismiss on the various
2 entities. With regard to -- and looking at this now as
3 it's been explained to me basically twofold: The
4 receiver's ability and the motion to dismiss as far as it
5 goes to the receiver this court just does not believe that
6 it has the authority to set aside or to do anything but
7 follow the order that has currently been entered by Judge
8 Worthington in that case. I don't believe I can sit as a
9 court of appeals. And I realize the defendants in this
10 case felt this was the quickest, best way to address that
11 issue, but I will deny the motion to dismiss with regard to
12 the receiver with the caveat being that if for some reason
13 that order is revoked by Judge Worthington or if it is
14 certified and the Supreme Court revokes it, I do not think
15 the receiver has any authority just as receiver for Marsha
16 Schubert.

17 So if that order should, in fact, be revoked, then
18 I would be granting a motion to dismiss with regard to the
19 receiver in this case absent you-all finding me some great
20 case to convince me otherwise. But I don't think I'm the
21 proper legal entity to sit as a court of review, and I'm
22 sure Judge Worthington doesn't think I'm the appropriate
23 order (sic) to review his order, and that all of the
24 arguments should be presented to him at this August hearing
25 that Mr. Bednar currently has set.

1 With regard to the Department of Securities,
2 ma'am, you had indicated that you wanted an opportunity to
3 respond to their two SEC cases that they had cited?
4 Because in reading those two SEC cases it seemed to me,
5 unless for some reason the fact that it was the federal SEC
6 versus the State Department of Securities, that they were
7 pretty broad and indicated that the Department can do
8 exactly what it's doing. My question to you is: You
9 indicated that you wanted an opportunity to respond to
10 those?

11 MS. MUEGGENBORG: Right. I think that the
12 congressional intent in the SEC statute allowing equitable
13 relief is clear that it's to go after wrongdoers on behalf
14 of defrauded creditors, not to bring third party claims,
15 third -- not to bring claims on behalf of third parties
16 against innocent individuals. And I think that also with
17 regard to the SEC cases that have been cited, we're not
18 sure exactly whose assets they are going after at this
19 point. Egan does not make clear as to whether or not it
20 was the individual. You know, somehow that was an asset of
21 the wrongdoer.

22 So I don't think that that case goes into the
23 factual analysis of exactly the assets that are being
24 sought after from the innocent investors and equitable
25 relief that is being done in that case or attempting to be

1 done in that case. But, yes, in the congressional history
2 of the SEC statute 78 U, it repeatedly talks about that the
3 purpose of the statute is to go after wrongdoers and on
4 behalf of defrauded creditors, equitable remedies.

5 And also I would like to direct the court's
6 attention to 1-603 where it specifically limits actions
7 against wrongdoers in subsection A. So, again, whether
8 there is equitable relief against defrauded creditors or
9 not, you still have to have a wrongdoer, it does not
10 specifically give the ODS authority to bring claims on
11 behalf of third parties to go after innocent victims.

12 THE COURT: So you think although, granted, we
13 have a wrongdoer here -- and I guess she has pled guilty so
14 I can refer to her as the wrongdoer -- that the remedies
15 are limited strictly to remedies against the wrongdoer and
16 not with regard to third parties?

17 MS. MUEGGENBORG: It's limited to her assets.

18 THE COURT: What I will do is I am going to give
19 you ten days to respond to the cases that they have set in
20 there, the SEC cases. I will give the receiver and the
21 Department five days, and then I will just make a written
22 ruling with regard to the Department of Securities'
23 ability, the standing that they may or may not have.

24 So your brief is due in ten days, the
25 receiver's -- and I guess the receiver, whether you want to

1 file one or not, but the Department's brief will be due
2 five days after that. And then I will make a ruling
3 shortly after that so you-all will know what my position is
4 on the Department's ability to go separate and apart from
5 the receiver.

6 MS. CORNMESSER: Your Honor, I think -- we spoke
7 for a minute, and we feel like this is not a motion for
8 summary judgment on the fact, and we disagree with allowing
9 extension of time. They had an opportunity to respond to
10 our standing. You know, we feel like that has been drawn
11 out. The Egan case specifically says:

12 "The court can obtain equitable relief from a nonparty
13 against whom no wrongdoing is alleged if it is
14 established that the nonparty possesses illegally
15 obtained profits but has no legitimate claim to them."

16 They have had as much time to read these as we
17 have.

18 THE COURT: I have to admit that until a few
19 moments ago I didn't realize how the two arguments were as
20 separate as they are, so I would like to do just the
21 briefing. I certainly don't mean to turn this into a
22 motion for summary judgment. I realize you-all will still
23 be relying very heavily on the SEC case, and I realize you
24 both interpret the statute differently. But I just want to
25 hear what both of you-all have to say on that, in

1 particularly you, because I too didn't grasp the
2 separateness of the two different entities until today's
3 hearing. But I will rule on that within five days after I
4 get both briefs.

5 With regard to the motion to -- on the venue
6 issue, I'm not inclined to transfer this. I will deny the
7 motion to transfer on the venue issue. I do not believe --
8 I mean, Logan County -- none of the properties are located
9 in Logan County anyway, so we would still be dealing with
10 the issue of the separate properties. I do believe that at
11 this point just the establishment or the nonestablishment
12 of an equitable lien does not give anybody possession;
13 however, with the understanding that I do not believe for
14 one moment I would ever have authority to foreclose on
15 those liens unless the properties were located in Oklahoma
16 County. I do think I would have the authority to determine
17 whether a lien as a remedy should or should not be
18 established as a result of the two claims that are being
19 set forth.

20 I am also going to deny the request on the forum
21 non conveniens to transfer this to Logan County.

22 Does that take care of all of the issues with
23 regard to your motion to dismiss?

24 Mr. Heggy, with regard to your motion on the
25 jurisdiction and the motion to sever and the motion for the

1 jurisdiction, let me ask: It appeared to me from your
2 argument that you were arguing that because of the -- that
3 you thought was an attempt to file this case in one lawsuit
4 to avoid all the filing fees, the Department points out
5 that they themselves wouldn't incur any filing fees. I am
6 assuming the receiver would still have to pay separate
7 filing fees if this had been filed in different counties.

8 Summarize for me how your argument for
9 jurisdiction may or may not differ from what Mr. Bryant and
10 Ms. Mueggenborg had argued in their motion.

11 MR. HEGGY: Your Honor, if I may, this is a simple
12 motion regarding joinder. We have been misjoined. As just
13 been admitted in oral argument of the receiver, some of the
14 defendants were innocent investors and some were not. Now,
15 if we're not going to turn this into a motion for summary
16 judgment proceeding, we can only go by the allegations that
17 are in the petition. And in the petition it is
18 specifically alleged that there are defendants in this case
19 that received gifts, substantial gifts, of real estate and
20 cash, and those people should be in separate cases from
21 investors who received more money than they paid into the
22 investment situation.

23 Thirdly, there's probably a class of people here
24 that invested tremendous amounts of money and have set-off
25 claims of great enormity, and they should be in a third

1 class, and that would be my clients. Jamie Walker Glover
2 received a check from Marsha Schubert in the amount of
3 \$3,000 because Ms. Schubert was the successful bidder at an
4 FFA auction of Ms. Glover's heifer in October of 2001. I
5 don't think the other 158 defendants will want to sit
6 through a half a day of the evidence regarding the FFA
7 auction that Ms. Schubert participated in, and I don't
8 think they will want to sit through the evidence of what
9 happened to the heifer.

10 The next check that Ms. Glover was sued over was a
11 \$100 graduation gift dated May of 2002, from Marsha
12 Schubert's personal account. I don't think the other 158
13 defendants will want to hear about the \$100 graduation
14 gift. The last item regarding Jamie Glover is a wire from
15 Marsha Schubert's personal account to DLJ Pershing. Now,
16 that, I believe, is Donaldson, Lufkin, Jenrette, a
17 predecessor firm to TD Waterhouse. Now, I don't know why
18 DLJ is not sitting here as a defendant because of that
19 wire. But what I do know is that it clearly indicates that
20 there was a transfer by a registered representative of cash
21 to an investment account at DLJ. And clearly if that is
22 not related to investment I don't know what would be.

23 Finally, Ms. Glover was the recipient of \$33,000
24 in investment gifts from her grandparents into an
25 investment called Evergreen that Ms. Schubert ran. And so,

1 indeed, Ms. Glover is an investor of \$33,000 in one of the
2 Schubert schemes and has a setoff larger than the entire
3 claim against her. I don't think the other 158 defendants
4 should be forced to sit through that.

5 Mr. Powell, my other client, received four bank
6 wires into investment accounts. The first wire was in 2003
7 to Donaldson, Lufkin, Jenrette, and the next four wires
8 were to AXA. Now, these are multibillion dollar investment
9 broker/dealers. This is a registered representative
10 sending in the money. And also the AXA office in Crescent
11 was actually run by Ms. Schubert. You would think that
12 AXA's compliance department would have asked a question
13 when personal funds were being wired from their registered
14 representative to the accounts of a customer. That
15 question apparently did not get asked by compliance at AXA.
16 It also apparently didn't get asked by the Oklahoma
17 Department of Securities.

18 I'm amazed that the 158 people that have been sued
19 in this case are the little Oklahoma citizens and we don't
20 have a representative here from AXA or DLJ. But,
21 nevertheless, I can't imagine two defendants that can be
22 more disparate. One deals with five wires into
23 broker/dealer accounts, one deals with a check for a
24 heifer, a graduation gift, and a wire into an investment
25 account. I can't imagine anything more disparate

1 factually. So there is no common question of fact even
2 between my two clients.

3 Now, we do know that Jamie Glover was given a gift
4 by her grandparents into Evergreen, \$33,000; that makes her
5 an investor. Mr. Powell was not an investor in Schubert
6 and Associates, he was an investor at AXA, the multibillion
7 dollar broker/dealer that licensed Ms. Schubert and that
8 Ms. Schubert represented as a registered representative.
9 Now, there are no checks involved in Mr. Powell's
10 situation, there are no checks from her personal accounts.
11 But both of these clients, neither one of them have checks
12 from business accounts.

13 Now, I can't say as I sit here today because we
14 have had no discovery that these wires did or did not come
15 from business accounts. But what I can say is that that
16 would be an intense factual inquiry that would need to be
17 made on both of these situations. And in both situations
18 the question of whether or not a wire would put someone on
19 notice for purposes of a fraudulent transfer that they were
20 receiving more than they were entitled to is a delicate
21 fact question.

22 Combining 150 of these delicate fact questions
23 into the same hearing makes for an impossible trial and a
24 denial of due process, and that is the reason this is an
25 impermissible joinder under our statute. There is no

1 possible way to make this work. There is no common law
2 question or common fact question which would eliminate my
3 clients' cases in a final order that would be appealable
4 that wouldn't waste the time of 150 other litigants plus be
5 confused with the questions raised by the other 150
6 litigants.

7 And that, your Honor, is respectfully why I would
8 suggest that you should order severance.

9 THE COURT: Receiver, Mr. Davenport.

10 MR. DAVENPORT: Your Honor, plaintiff/receiver
11 believes that these claims have, in fact, been properly
12 adjoined in this case. The Oklahoma statute that governs
13 this, Title 12, Section 2020, specifically references the
14 joinder of the defendants is subpart 2 of that statutory
15 section. And it indicates that although persons may be
16 joined in an action as defendants if there is asserted
17 against them jointly, severally, or in the alternative.
18 And if you look at subparagraph B it says that the claims
19 arise out of a series of transactions or occurrences in any
20 question of law or fact common to all defendants realized
21 in the action.

22 Again, what we're dealing with at this point in
23 time, your Honor, is the content, specifically the
24 allegations in plaintiff's petition. As Mr. Heggy stated,
25 this isn't a motion for summary judgment, yet we heard a

1 bunch of alleged facts, none of which are in evidence in
2 this case regarding the source of, you know, certain
3 alleged payments.

4 The bottom line is, your Honor, that the two
5 causes of action that the plaintiff/receiver and plaintiff
6 Department of Securities have alleged in this case as a
7 common law action of unjust enrichment and a cause of
8 action based upon the statutory language of the Uniform
9 Fraudulent Transfer Act. Both recognize cause of action as
10 two same causes of action that are brought against all of
11 the 158 initial relief defendants.

12 Whether or not a particular relief defendant
13 allegedly received a gift of cash, an automobile, or some
14 other object, for example, all of those items would
15 constitute assets under the Uniform Fraudulent Transfer
16 Act. It doesn't matter whether the relief defendant
17 received a payment of cash or an automobile when it comes
18 to determining whether or not that relief defendant was
19 unjustly enriched by receipt of that asset.

20 In fact, your Honor, counsel's argument is even
21 contrary to Oklahoma statutory language. Referencing the
22 court to Title 12, Section 2020(A)3. Says:

23 "The plaintiff or defendant need not be interested in
24 obtaining or defending against all of the relief
25 demanded. Judgment may be given for one or more of the

1 plaintiffs according to their respective rights to
2 relief and against one or more defendants according to
3 their respective liabilities."

4 Your Honor, again, based on the four corners of
5 the plaintiff's petition and the allegations in that
6 petition, the same two causes of actions asserted against
7 these defendants, plaintiff/receiver respectfully requests
8 that the defendants were permissively joined.

9 Furthermore, you know, to sever these lawsuits as
10 defendant's counsel suggests would require
11 plaintiff/receiver to file approximately 25 lawsuits here
12 in Oklahoma County and an additional 25 lawsuits in both
13 Logan and Kingfisher Counties, an additional seven to eight
14 lawsuits in another eight to ten counties in the state of
15 Oklahoma. To do so would put the case against these relief
16 defendants, based on the very same legal causes of action,
17 against -- up in front of several different triers of fact
18 which may result in disparate outcomes even though it's the
19 same causes of action against the defendants.

20 And also trying -- having to try this many cases
21 in this many different counties would be the logical result
22 of defendant's argument would require an enormous waste of
23 receivership assets. And the only thing that does is
24 further harm these investors who have already been
25 defrauded by Marsha Schubert. Your Honor, based on the

1 facts and legal authority laid out, the plaintiff/receiver
2 respectfully requests that the court deny the two motions
3 to sever.

4 THE COURT: Thank you. Ms. Cornmesser.

5 MS. CORNMESSER: Your Honor, we just want to point
6 out the Department feels that joinder is proper in this
7 case under the two-prong test, Section 2020(A)2, that our
8 right to relief must be asserted by or against each
9 plaintiff or defendant relating to or arising out of the
10 same transaction or occasion. We feel like all of these
11 relief defendants have basically the same story. There are
12 some different facts in them, but basically it's all
13 stemming from Schubert and Associates.

14 And too some questions of law and facts common to
15 all parties will arise in the action. We feel like there
16 is convenience in joining these defendants and filing it in
17 one action in Oklahoma County. There is convenience for
18 all attorneys in this case, and we felt that most of the
19 defendants lived closer to Oklahoma County than anywhere,
20 so that's our reason for joining them all in the Oklahoma
21 County suit.

22 And I believe that the accounting will show at
23 some point when we have the opportunity to present it that
24 this can all be done organizationally. And the fact that
25 each defendant will have his or her own time to come, and

1 not all 158 defendants will be sitting in the courtroom at
2 that time. So once the accounting is outlined through the
3 case management organizationally, we can work all this out
4 so it would not be a burden on all of these defendants.

5 THE COURT: Anything further, Mr. Heggy? Mr.
6 Heggy, do you not think that just the question with regard
7 to what we have spent the majority of today talking to, and
8 that's the receivership's ability to proceed and then the
9 Department's ability to proceed separate and apart, that
10 that alone is a common question of law that needs to be
11 determined as to all the defendants?

12 MR. HEGGY: Your Honor, if that were so, there
13 would only be one product liability case in the country
14 every year. There would only be one mass tort case in the
15 country every year. The fact of the matter is there is no
16 single dispositive issue of law or fact that runs through
17 these cases by which these defendants can be adjudged and
18 adjudicated so that there can be a final order and then an
19 appeal.

20 What we have here is a situation where -- and you
21 heard the testimony of the counsel. The administrative
22 burden is what caused them to file this mass filing, and
23 they then shifted the administrative burden to the private
24 citizens. That's unfair. It's overreaching. The statute
25 specifically says there has to be a common question of law

1 and fact. What is --

2 THE COURT: Law or fact, correct?

3 MR. HEGGY: -- what is that common question of law
4 or fact that applies to all 158 people?

5 THE COURT: Well, for instance, if I should
6 determine that the Department cannot proceed separate and
7 apart from the receiver, would that not be a common
8 question of law that I would be determining as to all the
9 defendants?

10 MR. HEGGY: I was under the impression that you
11 weren't going to do that. I thought you were going to
12 defer to Judge Worthington.

13 THE COURT: No. That's with regard to the
14 receiver. Keep in mind now that I understand that the
15 receiver argument is: Was he properly appointed for the
16 investors and creditors, and did Judge Worthington have the
17 authority to appoint the receiver for investors and
18 creditors when they weren't given notice, et cetera, the
19 various arguments made by Mr. Bryant? And then the
20 separate issue is the issue that will be briefed in ten
21 days.

22 I'm allowing Mr. Bryant an opportunity to respond
23 to even if the receiver is kicked out of the picture does
24 the -- and even if the receiver, once Judge Worthington
25 should he be inclined to change his order and not have the

1 receiver appointed, I would then dismiss this case with
2 regard to the receiver, which would be a common question of
3 law that would go to all the defendants.

4 Then the Department of Securities is an entirely
5 separate argument independent from the receiver.
6 Regardless of what happens to the receiver, they argue they
7 have the authority under those two SEC cases in Section
8 1-603 to proceed independently, which is the issue that I
9 will make a written ruling on after Mr. Bryant has an
10 opportunity -- so don't you agree both of those issues
11 would be common questions of law with regard to all of the
12 defendants? They all stand to benefit or to --

13 MR. HEGGY: I certainly agree that is a common
14 question of law that affects the plaintiffs. I don't know
15 that I can say that I know for a fact that that would be a
16 common question among all 158 defendants. The defendants
17 in this case so far represent a number of procedural
18 positions: Some have filed answers, some have filed
19 counter-claims. I don't know whether that ruling would be
20 dispositive as to all. All I can honestly say I think is
21 that there is no common question of law with regard to this
22 case.

23 Now, even if the court is right about the
24 receiver, I don't think there is a question of law about
25 this case that applies to all 158 people, and I certainly

1 think there is no question of fact. So while I certainly
2 can see that a lot of people might be affected, I can see
3 that part, I just don't know for a fact as I see it here,
4 that all 158 would definitively, dispositively be affected.

5 But certainly what I think I can say is that
6 because of the procedural posture of the case, it may not
7 be dispositive as to all parties. So I don't know that for
8 a fact, and we would still be stuck here waiting for that
9 final dispositive, final ruling.

10 And, your Honor, to be blunt, I have been trapped
11 in this situation before. I have been trapped in front of
12 Judge Wiseman and Judge Peterson for ten years, the
13 Petiman (phonetic) litigation. I have been trapped in MDL,
14 the multidistrict litigation that went to the federal level
15 that went decades. I was trapped in the Kerr-McGee
16 insurance coverage litigation that went ten years in front
17 of Judge -- a variety of judges.

18 My point is that this is a nightmare. You do not
19 want this. You don't want it in your courthouse. You
20 don't want to let it get started. There is no common
21 question of law that they can say today on the pleadings
22 that we have would effectively dispose of every claim
23 before you. And if they can't say that, then they don't
24 have a question of law that's common.

25 THE COURT: Mr. Heggy, I will deny the motion to

1 sever. I do think there are common questions of law.
2 Having said that, let me address a couple of your concerns.
3 I do not intend to let this case waste away forever. I
4 think someone has filed a motion to enter. I intend to
5 immediately set a scheduling order. And I want to do all
6 of this after the August 12th date, at which point I will
7 have ruled on the Department's standing, as well as have
8 some indication on what Judge Worthington is going to do on
9 the receiver. I intend to set deadlines. I intend to
10 stick to those deadlines.

11 I want to get you a trial date as soon as
12 possible. We're not going to wait to the pretrial to get
13 our trial date. I will set our trial date at the same time
14 that we do a scheduling order with some guidance from each
15 of you as to what it's going to take as far as discovery is
16 concerned.

17 In private practice I unfortunately had the
18 experience where I was the defendant with 150 plus other
19 defendants, and I found that it was not as unwieldy as I
20 initially thought mainly because the judge was very strict
21 with regard to scheduling. He set aside certain days which
22 would be days that he set aside just for that case. And I
23 intend to do the same thing because I don't intend to let
24 my docket get bogged down because of any one particular
25 case. So with that said, I will deny the motion to sever.

Let me ask off the record for a moment.
(Conclusion of proceeding.)

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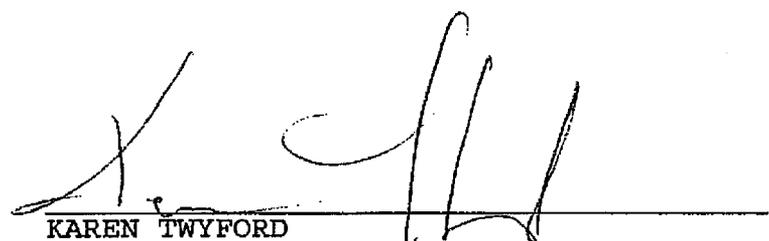
1 STATE OF OKLAHOMA)
2 COUNTY OF OKLAHOMA)

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4 C-E-R-T-I-F-I-C-A-T-E

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6 I, Karen Twyford, Certified Shorthand Reporter,
7 in and for the County of Oklahoma, State of Oklahoma, do
8 hereby certify that the foregoing transcript, is a true,
9 correct, and complete transcript of my stenographic notes.

10 I further certify that I am not related to any of
11 the parties herein, nor am I interested in any way in the
12 outcome of these proceedings.

13 WITNESS my Hand this 22nd day of July,
14 2005.

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19 KAREN TWYFORD
20 CERTIFIED SHORTHAND REPORTER
21 CERTIFICATE NO. 01780

22 Karen S. Twyford
23 Oklahoma Certified Shorthand Reporter
24 Certificate No. 1780
25 Exp. Date: December 31, 2005