

STATE OF OKLAHOMA
LOGAN COUNTY SS
FILED FOR RECORD

IN THE DISTRICT COURT OF LOGAN COUNTY
STATE OF OKLAHOMA

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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.)

**OKLAHOMA DEPARTMENT OF SECURITIES' MEMORANDUM IN OPPOSITION
TO RICHARD LEBOEUF'S MOTION TO CONSOLIDATE**

I. Defendant LeBoeuf has failed to comply with applicable statutory procedures.

On July 18, 2005, the Oklahoma Department of Securities (Department) received a copy of Richard LeBoeuf's (LeBoeuf) *Intervention of Party and Motion to Consolidate* filed on July 8, 2005. Pursuant to 12 O.S. § 2024(C), a person may only intervene after seeking the permission of the court through a proper motion to intervene. The motion must state the grounds for intervention and be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The motion may be granted in the discretion of the court.

Here, LeBoeuf has not filed a motion to intervene as required by the Oklahoma Pleading Code, but instead, has assumed permission to intervene. The Department requests the motion to consolidate be denied by this Court.

II. Consolidation is not proper.

Should LeBouef be granted permission to intervene, consolidation is not proper and the suit filed in Logan County should not be transferred to Oklahoma County.

On October 14, 2004, the Department filed suit against Marsha Schubert, individually and doing business as Schubert and Associates (Marsha Schubert), and Schubert and Associates in this Court for violations of the Oklahoma Uniform Securities Act of 2004 (Act), Okla. Stat. tit. 71, §§ 1-101 through 1-701 (Supp. 2003), and the Oklahoma Securities Act (Predecessor Act), Okla. Stat. tit. 71, §§ 1-413, 501, 701-703 (1991 & Supp. 2003) (Logan County Suit).

On October 14, 2004, this Court appointed Douglas L. Jackson as Receiver (Receiver) over the assets of Marsha Schubert and Schubert and Associates. On December 10, 2004, the Logan County District Court amended the order appointing receiver specifically providing that Douglas L. Jackson be Receiver for the investors and creditors of Schubert and Associates with authority to institute actions to recover assets, and to protect the interests of and promote equity among the investors in the Schubert and Associates investment program.

On May 11, 2005, the Department and the Receiver filed a joint civil suit in Oklahoma County District Court against 158 nominal or relief defendants based on the theories of unjust enrichment and/or fraudulent transfer (Oklahoma County Suit). These relief defendants (Defendants) received phantom profits and/or gifts from funds belonging to others. The amount of such phantom profits and/or the value of such gifts exceeded the amount each Defendant transferred to Schubert and Associates.

Under 12 O.S. § 2018(C), which is identical to Fed. R. Civ. P. 42(a), actions may be consolidated if they involve a common question of law or fact. The purpose of the consolidation of actions is to prevent unnecessary costs or delay. *Thomas v. E-Z Mart Stores, Inc.* 102 P.3d

133 (Okla. 2004). However, courts have viewed that the convenience and economy should be weighed against considerations of confusion and prejudice in deciding whether to order consolidation. See *Propriety of Ordering Consolidation under Rule 42(A) of Federal Rules of Civil Procedure in Actions Involving Securities*, 83 A.L.R. Fed. 367.

LeBoeuf incorrectly argues that the Logan County Suit and the Oklahoma County Suit filed by the Department involve the same parties, same legal issues, and same facts. The Logan County Suit was filed by the Department against Marsha Schubert, individually and *dba* Schubert and Associates, for violations of this state's securities laws. Specifically, the Department alleged that Marsha Schubert and Schubert and Associates offered and sold unregistered securities, failed to register as agents, employed unregistered agents, and perpetrated fraud in connection with the offer, sale, or purchase of securities. On November 15, 2004, the Logan County District Court issued a consent order of permanent injunction against Marsha Schubert and Schubert and Associates.

The Oklahoma County Suit was filed by the Department and the Receiver to seek disgorgement from the 158 Defendants who were unjustly enriched and/or received fraudulent transfers. The Department alleges that the Defendants received gifts, such as homes or vehicles, or cash to which the Defendants have no legitimate claim. The Department did not allege any securities law violations against these Defendants. There are no common defendants between the two cases and no common questions of law and/or fact exist. *St. Paul Fire & Marine Ins. Co. v. King*, 45 F.R.D. 519 (W.D.Okla.1968) (case did not basically involve a common question of law and fact and consolidation for trial was refused).

The Receivership should not be set aside as requested by LeBoeuf. Furthermore, it is not necessary to move the Receivership action to Oklahoma County. The Receivership was

established by this Court based on violations of the Act occurring in Logan County. In compliance with this Court's order to marshal the assets of Marsha Schubert and/or Schubert and Associates, the Receivership has been very active since October of 2004. The Receiver has collected substantial monies from certain of the unjustly enriched investors, hired entities to hold auctions and to analyze bank records, received proceeds from auctions, and made court filings and appearances on behalf of the Receivership. To set aside the Receivership would be an undue hardship on third parties who have already reached resolution of the issues affecting such parties with the Receiver.

Conclusion

In conclusion, the Department would like to rectify some issues of law and fact which LeBoeuf has misrepresented to the Court. First, LeBoeuf states that the Department and the Receiver have asked that the Oklahoma County District Court preside over their consolidated matters. The Department and the Receiver have not asked that the Receivership be consolidated with the action in Oklahoma County. The Department and the Receiver filed the action against the Defendants in Oklahoma County because it was a proper and convenient forum. The Logan County Suit was appropriately filed in Logan County and the jurisdiction over the Receivership should so remain. The Department's allegations against the defendants in the Logan County Suit have been resolved. The only outstanding issue before this Court is the administration of the receivership.

In the Oklahoma County Suit, Marsha Schubert may be an important witness but she is not a necessary party to the suit. LeBoeuf argues that Marsha Schubert is a party able to explain key issues of fact. In addition, Marsha Schubert has pled guilty in federal court and her attorney

has advised the Department that she would take the Fifth Amendment upon being called as a witness in any civil case.

LeBoeuf misrepresents the powers of the Receiver by stating that the Receiver should have first utilized the administrative powers available to the Department of Securities to conduct investigations. However, the Receiver is an officer of the court. *Eckles v. Busey*, 191 Okla. 644, 132 P.2d 344, 346 (Okla. 1942). The Receiver's authority to seek the appointment of a receiver is not derived from the Department's statutory authority but from the very act of this Court in making the appointment. *Hardman v. Whitney*, 54 P.2d 1065, 1066 (Okla. 1936), citing the Supreme Court of the United States in *The Union National Bank of Chicago v. Bank of Kansas City*, 136 U.S. 223, 10 S. Ct. 1013, 1017, 34 L.Ed. 341 (U.S.Mo. 1890).

LeBoeuf states that the Receiver should have used the Department's "free state resources" to investigate the case filed in Oklahoma County. The Receiver is an officer of the court and not an agent of the Department. Further, taxpayers of the State of Oklahoma would no doubt disagree with LeBoeuf that the Department has "free state resources." The Department conducted a nine month investigation to determine who was unjustly enriched and who truly lost money in the Schubert and Associates matter. The Department fully investigated this matter to bring the Oklahoma County Suit. Like the Defendants, the Department is now entitled to conduct discovery.

Lastly, LeBoeuf misleads the Court by stating an administrative investigation was opened on December 10, 2004 in this matter. The Department did issue an Order Initiating Investigation (OII) as to the supervision of Marsha Schubert by AXA Advisers, LLC (AXA) and Wilbanks Securities, Inc. (Wilbanks). The OII clearly states that the investigation was opened to determine any violations of the Act by AXA or Wilbanks. This OII was not opened to investigate anything

other than whether AXA or Wilbanks violated the Act. A permanent injunction had already been entered in Logan County in connection with Marsha Schubert and Schubert and Associates' violations of the Act; thus, resolving all enforcement issues relating directly to Marsha Schubert and Schubert and Associates.

The suits filed in Logan County and Oklahoma County involve completely different claims and to consolidate the actions would be unnecessary and unwarranted. The Department requests that the authority over the Receivership remain within the jurisdiction of the Logan County Court.

Respectfully submitted,

OKLAHOMA DEPARTMENT OF SECURITIES
Irving L. Faight, Administrator

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CERTIFICATE OF SERVICE

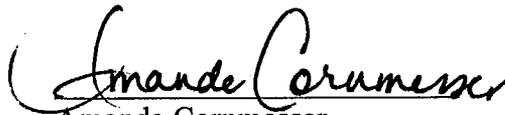
The undersigned hereby certifies that on the 25th day of July, 2005, a true and correct copy of the above and foregoing was mailed by U.S. Mail, with postage prepaid thereon, addressed to:

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