

IN THE DISTRICT COURT OF LOGAN COUNTY
STATE OF OKLAHOMA

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.)

**OKLAHOMA DEPARTMENT OF SECURITIES' MEMORANDUM IN OPPOSITION
TO MOTION TO VACATE EX PARTE ORDER APPOINTING DOUGLAS L.
JACKSON AS RECEIVER FOR INVESTORS OF MARSHA SCHUBERT OR
ALTERNATIVELY, TO TRANSFER THIS MOTION TO THE OKLAHOMA COUNTY
DISTRICT COURT, AND MOTION TO AMEND ORDER AMENDING AUTHORITY
OF RECEIVER**

On July 27, 2005, the Oklahoma Department of Securities (Department) received a copy of the *Motion to Vacate the Ex Parte Order Appointing Douglas L. Jackson as Receiver for Investors of Marsha Schubert or Alternatively, to Transfer this Motion to the Oklahoma County District Court* (Motion to Vacate) filed by Kline and Kline on behalf of certain relief or nominal defendants in a case pending in Oklahoma County (Movants).

BACKGROUND

On October 14, 2004, the Department filed suit in this Court against Marsha Schubert, individually and doing business as Schubert and Associates, and Schubert and Associates

(collectively, "Enforcement Action Defendants") 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 November 15, 2004, the Logan County District Court issued a consent order of permanent injunction against Marsha Schubert and Schubert and Associates.

On October 14, 2004, this Court also appointed Douglas L. Jackson (Jackson) as Receiver (Receiver) for Marsha Schubert and Schubert and Associates. On December 10, 2004, at the request of the Department, this Court amended the order appointing Jackson to allow the Receiver to act for the creditors of the Enforcement Action Defendants; to institute actions to recover assets, to include assets directly traceable as proceeds of the Enforcement Action Defendants' fraudulent investment scheme; and to promote equity and a fair distribution among the participants in the Schubert and Associates investment program. It is this order that Movants seek to vacate. To better articulate its intentions, the Department hereby requests that the December 10th *Order Amending Authority of Receiver* be amended as reflected in Exhibit 1 hereto.

Over the course of several months, the Receiver and the Department conducted a financial analysis of the bank accounts controlled by the Enforcement Action Defendants. The analysis determined that Enforcement Action Defendants had operated a Ponzi scheme wherein they made payments to participants, purportedly generated from investment activities, when in actuality the payments came from other participants' money. As a result, three distinct classes of participants in the Ponzi scheme were identified: 1) participants in the investment program who suffered net investment losses (Short Investors); 2) participants in the investment program who

were unjustly enriched through the transfers of assets directly traceable to the proceeds of the fraudulent scheme when such transfers were not supported by proper consideration (Long Investors); and 3) persons who did not invest any amount of money in the investment program, yet received assets traceable to the proceeds of the fraudulent scheme (Non-Investors).

Upon further investigation, it became apparent that there would be no relief for the Short Investors other than through recovery of the money transferred to the Long Investors and the Non-Investors. Therefore, on May 11, 2005, the Department and the Receiver filed a joint civil suit in Oklahoma County District Court against 158 of the Long Investors and Non-Investors as nominal or relief defendants (Oklahoma County Relief Defendants) based on the theories of unjust enrichment and/or fraudulent transfer (Oklahoma County Suit). The Oklahoma County Relief Defendants received phantom investment profits and/or gifts that were not supported by proper consideration. Such phantom profits and gifts were paid by the Enforcement Action Defendants from the investment proceeds of other persons.

I. Movants should not be allowed to intervene.

Oklahoma statutes and case law recognize two types of intervention: (1) intervention as of right, and (2) permissive intervention. 12 O.S. § 2024(A) and (B). Since Section 2024 is based on Fed. R. Civ. Proc. 24, with only minor changes, case law interpreting the federal rule is instructive. See Committee Comment to Section 2024.

Pursuant to 12 O.S. § 2024(C), a person may only intervene in a matter after seeking the permission of the court through a proper motion to intervene. By statute, 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.

Movants have not properly filed a motion to intervene as required by Section 2024. Instead, Movants have made a very informal request to intervene in the form of a footnote in their Motion to Vacate. In addition, Movants have not set forth the claim or defense for which intervention is sought.

A. Intervention as a matter of right

Intervention is a matter of right when (1) the application is timely made; (2) the applicant claims an interest relating to the property or transaction which is the subject of the main action; and (3) the applicant's ability to protect that interest may, as a practical matter, be impaired or impeded if the applicant is not allowed to intervene. 12 O.S. § 2024(A). If one of the factors is absent, intervention as of right is not warranted. *SEC v. Kings Real Estate Investment Trust*, 222 F.R.D. 660 (D. Kan. 2004).

1. Timeliness

The timeliness of a motion to intervene should be considered in light of all of the circumstances, to include the expired length of time before the motion was filed. *Ute Distrib. Corp. v. Norton*, 43 Fed. Appx. 272 (10th Cir. 2002). Essentially, a determination of timeliness involves a test of reasonableness. “[P]otential intervenors need to be reasonably diligent in learning of a suit that might affect their rights, and upon so learning they need to act reasonably promptly.” *SEC v. Heartland Group, Inc.*, 2003 WL 1089366 (N.D. Ill.).

Ten months after the Receivership commenced, eight months after the Receiver notified the Non-Investors of his claim against them, five months after the Receiver notified the Long Investors of his claim against them, and three months after the commencement of the Oklahoma County Suit for disgorgement, the Movants filed the Motion to Vacate based in substantial part

on their lack of notice of the Amended Order in December of 2004. Movants did not act “reasonably promptly” to challenge the Receiver’s authority under the Amended Order.

In addition to not being complete, the Movants’ request to intervene is not timely. Therefore, mandatory intervention by the Movants is not warranted.

2. Interest in Property at Issue

Intervention of right should be allowed upon a proper showing that the applicant has a “specific legal or equitable claim” to an interest in the subject matter of the main action. *Ute*, 43 Fed. Appx. at 277. To justify mandatory intervention, the applicant’s purported claim or interest in controversy must relate to specific real or personal property. *Gettler v. Cities Service Company*, 739 P.2d 515 (Okla. 1987). One of the deficiencies in the Movants’ intervention request is that they do not establish or otherwise describe any legal or equitable interest in, or a claim against, the Receivership property, the subject of the main action in the Logan County Suit.

Over half of the Movants are Non-Investors - persons who did not invest any money in the Schubert investment program, yet received proceeds of the Enforcement Action Defendants’ fraud. Since these Relief Defendants received assets to which they have no legitimate claim, the Movants do not have a property interest that is subject to the controversy in this case.

Essentially, the Movants are challenging the Receiver’s decision to seek disgorgement in the Oklahoma County Suit. The Movants are not injecting a claim or interest against the Receivership property into controversy through the present motion. Further, the Movants do not have a legally protectable interest in the continued administration of the Receivership. Consequently, mandatory intervention is not warranted.

3. Effect of Denial of Intervention [Impairment]

The third factor to support intervention of right is the applicant's ability to demonstrate that his interest or claim will be impeded absent intervention. Again, the Movants have failed to establish an interest or claim as to the Receivership property. Should this Court determine that such an interest or claim has been established, Movants have failed to demonstrate impairment.

As stated by the 10th Circuit Court in *Ute*, "[l]itigation impairs a third party's interests when the resolution of the legal questions in the case effectively foreclose the rights of the proposed intervenor in later proceedings." *Ute*, 43 Fed. Appx. at 279. The United States Securities and Exchange Commission in *Kings Real Estate*, 222 F.R.D. 660, requested the appointment of a receiver to collect and preserve the receivership assets for proper distribution upon notice and application to the court. The court found that the claims procedure established by the receiver would provide the applicant with sufficient protection to assert all his claims. The *Kings Real Estate* court thereby found that the proposed intervenor was not entitled to intervention as of right because he failed to demonstrate that his interests would be impaired or impeded without intervention. *See also Commodity Futures Trading Commn. v. Chilcott Portfolio Mgt., Inc.*, 725 F.2d 584 (10th Cir. 1984) (motion to intervene was appropriately denied since purported intervenor was not precluded from asserting his claim under the claims procedure established by the receiver).

In the instant case, certain of the Movants have already filed a claim under the claims process set up by the Receiver under the supervision of this Court. Secondly, as in *Kings Real Estate*, 222 F.R.D. 660, once all of the Receivership assets are collected, the Receiver will present a proposed distribution plan to the Court to which the Movants will have an opportunity

to present objections. In addition, the Relief Defendants will be able to adequately protect any interest or claim in an alternate state forum, that is, the Oklahoma County Suit.

Finally, the Movants seek to intervene in this case to challenge the conduct by the Receiver in order to quash the disgorgement proceeding pending in Oklahoma County. The Court's ruling on this issue will not benefit the Movants since the Department, on its own merits, is also seeking disgorgement from the Relief Defendants in the Oklahoma County Suit. Since any interest or claim the Movants may have will be adequately protected absent intervention, mandatory intervention is not warranted based on the third prong of the test.

The Movants' request does not meet any one of the elements for mandatory intervention. Thus, this Court should deny intervention of right to the Movants.

B. Permissive intervention

Under 12 O.S. § 2024(B), anyone may be permitted to intervene in an action when the application is timely made and the applicant's claim or defense and the main action have a question of law or fact in common. Again, the Movants have not (1) made application for intervention in a timely manner, (2) properly filed a motion to intervene under Section 2024(B), or (3) asserted an interest in or claim against Receivership property.

The Movants mistakenly argue that there is a common issue of law between the main action of the Logan County Suit - to stop the Enforcement Action Defendants' fraudulent activity and enforce the securities laws - and the Oklahoma County Relief Defendants' claim that the Amended Order is improper.

The Logan County Suit was filed by the Department against the Enforcement Action Defendants 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 a fraud in connection with the offer and sale of securities. As a result, the Court entered a permanent injunction. As an additional remedy, the Court appointed the Receiver to marshal and preserve assets for ultimate liquidation and distribution.

The Oklahoma County Suit was filed by the Department and the Receiver to seek disgorgement from the 158 relief defendants who were unjustly enriched and/or received fraudulent transfers through the investment program. The Department does not allege any securities law violations against these relief defendants. Rather, the Department alleges that the relief defendants received assets, in the nature of homes, vehicles, or cash, to which the relief defendants have no legitimate claim. Neither the Department nor the Receiver are targeting any funds in the relief defendants' possession for disgorgement other than the discrete group of assets traceable to the fraudulent sales of unregistered securities by the Enforcement Action Defendants.

Permissive intervention is within the Court's discretion. *Gettler*, 739 P.2d 515. Such is the case even if there is a common question of law or fact. Ultimately, the Court may deny intervention "if the intervention would unduly delay or prejudice the main case." *Kings Real Estate*, 222 F.R.D. at 670.

Due to the number of Movants, the restricted availability of the Court's time in the upcoming days and weeks, and the Department's experience with the Movants to date, intervention by the Movants would unnecessarily delay the administration of the Receivership and impede the work of this Court. In addition, the ultimate distribution by the Receiver would be reduced because Receivership assets would have to be expended for the purpose of defending the Movants' claims in this matter.

The Movants have not complied with the Oklahoma Pleading Code to seek the Court's permission to intervene in this matter and have failed to establish intervention of right. Therefore, the Department requests that the Court disallow intervention by the Movants.¹

However, should intervention be permitted pursuant to Section 2024(B)(2), the Court has discretion to specify any conditions deemed necessary. *Kings Real Estate*, 222 F.R.D. 660. The Department would therefore request that the Court limit the Movants' intervention to challenging the Amended Order only.

II. Movants were not entitled to notice in connection with the order amending the authority of the Receiver.

Should the Movants be allowed to intervene, their due process argument does not warrant vacation of the amended receivership order (Amended Order). The Movants argue that the Amended Order was sought and entered "ex parte without affording anyone prior notice or an opportunity to be heard." The Enforcement Action Defendants - the parties subject to the receivership - received notice of the motion to amend the order and opportunity to be heard. In fact, all of the Enforcement Action Defendants consented to the Amended Order.

The United States Supreme Court in *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314 (1950), established the governing principle relating to due process: "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.) Stated another way, "due process requires notice in any proceeding with an opportunity to appear and be heard before a valid **final judgment** may be

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entered.” *Hanley v. Four Corners Vacation Properties, Inc.*, 480 F. 2d 536, 538 (10th Cir. 1973).

First, the entry of the Amended Order by this Court in no way constituted a final judgment against the Movants. In entering the Amended Order, this Court did not conclusively determine the rights of the Movants; adjudicate any claim; resolve any dispute; distribute property; or bar judicial consideration of the alleged transfers not supported by proper consideration. Therefore, the Movants’ due process rights were not violated.

The Movants were, of course, entitled to notice when they were named as relief defendants in the Oklahoma County Suit for disgorgement of the tainted assets to which they have no legitimate claim. The Movants have been, and continue to be, accorded all the process to which they are due in the Oklahoma County Suit.

Second, the Movants are not “interested parties” in the Logan County Suit and would not have been given notice even if notice were necessary to anyone other than the Enforcement Action Defendants. The Court in *SEC v. Cherif*, 933 F.2d 403 (7th Cir. 1991), held:

“A nominal defendant is not a real party in interest, however, because he has no interest in the subject matter litigated. His relation to the suit is merely incidental and “it is of no moment [to him] whether the one or the other side in [the] controversy succeed[s].” quoting *Bacon v. Rives*, 106 U.S. 99, 104.

Movants are not creditors of the receivership estate, they have no legal or equitable interest in the estate and they can make no claim against the estate.

Finally, even if the Short Investors could be considered “interested parties” for purposes of notice, they are not before the Court today and do not appear to be contesting the Receivership as it is their best hope of receiving any recovery. Furthermore, the Amended Order does not interfere with any action that Short Investors may bring to redress the wrongs perpetrated against them. The Department believes that allowing the Receiver to proceed with recovery against the

Long Investors and the Non-Investors on behalf of and for the benefit of the Short Investors is the most economical and efficient way to resolve the inequities caused by the securities violations of the Enforcement Action Defendants.

III. The Department has the authority and interest in seeking disgorgement of proceeds of the securities fraud.

The Movants have suggested that the Department thinks it owns the property rights of the “investors” and creditors or that somehow those rights were usurped by the Department. This is not the case. The Administrator of the Department brought the Oklahoma County Suit to enforce public policy on his own authority, not on behalf of individual investors or creditors. In executing its enforcement role, the Department acts independently of victimized investors. *Feigin v. Alexa Group, Ltd.*, 19 P.3d 23 (Colo. 2001). In a similar situation under federal securities laws, the court found that the United States Securities and Exchange Commission's standing to obtain equitable remedies “stems from its duty to advance the public interest, something that is separate and apart from (although it may frequently concur with) the interest of injured investors.” *SEC v. Egan*, 856 F. Supp. 401, 401-402 (N.D. Ill. 1993).

The Oklahoma Supreme Court has found that the Oklahoma Legislature intended equitable remedies be available to the Administrator for enforcement under the Oklahoma securities laws and that the Administrator has the power to seek such remedial relief. *State ex rel. Day v. Southwest Mineral Energy, Inc.*, 1980 OK 118, ¶ 18-21, 617 P.2d 1334, 1338 (Okla. 1980). More specifically, this state's Supreme Court has held that disgorgement is an available remedy to the Administrator. *Day* at ¶ 21.

Movants argue that the Department does not have the capacity to sue since the Movants have not violated Oklahoma securities laws. While the texts of the Act and the Predecessor Act do not specifically address the Administrator's ability to seek disgorgement from relief

defendants, Section 1-602(B) of the Act and Section 406.1 of the Predecessor Act clearly confer equitable jurisdiction upon the district courts when securities law violations occur. The Act and the Predecessor Act also explicitly reference the important objective of promoting "greater uniformity in securities matters" among the states and federal government. See Section 1-608 of the Act and Section 501 of the Predecessor Act. In acknowledgement of the goal of uniformity, the Oklahoma Supreme Court has stated that the interpretive history of the federal securities acts, upon which Oklahoma's securities laws are modeled, is properly considered in the interpretation of similar state securities provisions. *Day* at ¶ 30-31.

Federal courts have found that:

[A]mple authority supports the proposition that the broad equitable powers of the federal courts can be employed to recover ill gotten gains for the benefit of the victims of wrongdoing, whether held by the original wrongdoer or by one who has received the proceeds after the wrong.... This court has declared that "federal courts have inherent equitable authority to issue a variety of 'ancillary relief' measures in actions brought by the SEC to enforce the federal securities laws." *SEC v. Wencke*, 622 F.2d 1363, 1369 (9th Cir. 1980). (Emphasis added.)

SEC v. Collelo, 139 F.3d 674, 676 (9th Cir. 1998). See also *SEC v. Better Life Club of America, Inc.*, 995 F. Supp. 167 (D.C.C. 1998); *SEC v. Seibald*, 1997 WL 605114 (S.D.N.Y.).

Contrary to the Movants' assertions, the Oklahoma and Logan County Suits in no way interfere with any action that the Relief Defendants may bring to redress the wrongs perpetrated against them. Section 1-509 of the Act and Section 608 of the Predecessor Act provide that any person who offers or sells securities in violation of the Act will be civilly liable to investors for damages, costs, attorney fees and interest. The investors also retain all rights and remedies they have under their contracts with their brokerage firms and are free to act against those entities for any wrong perpetrated against them. A regulatory enforcement action does not foreclose these rights.

IV. The Receiver can recover proceeds of the securities fraud.

The Movants have stated that the Amended Order is not consistent with Oklahoma law, thereby challenging this Court's authority and judicial judgment. However, the Receiver is an officer of this Court. *Eckles v. Busey*, 132 P.2d 344 (Okla. 1942). While the Court's actions to date are supported by the statutory grant of power set forth in Section 1-602 of the Act and Section 406.1 of the Predecessor Act, this Court's power to establish and maintain the life of the Receivership is also derived from the "inherent power of a court of equity to fashion effective relief." *SEC v. Wencke*, 622 F.2d 1363, 1369 (9th Cir. 1980).

By appointment of the Receiver, this Court has fashioned effective relief. The Court's actions are bolstered by federal cases in which a receiver was appointed to seek disgorgement of monies received by investors in excess of the amounts of their actual investments. *See Wing ex rel. 4NExchange, L.L.C. v. Yager*, 2003 WL 23354487 (D. Utah 2003); *Chosnek v. Rolley*, 688 N.E.2d 202 (Ind. App. 1997); *Scholes v. Ames*, 850 F. Supp. 707 (N.D. Ill. 1994); *Merrill v. Abbott (In re Independent Clearing House Co.)*, 77 B.R. 843, 858 (D. Utah 1987); and *Sender v. Buchanan (In re Hedged-Investments Associates, Inc)*, 84 F.3d 1286 (C.A 10 (Colo.) 1996).

In *Scholes*, the court stated that in order to pay a profit to any investor, perpetrators of a "Ponzi" scheme must fund payments from other, good faith investors. The *Scholes* court found that a receiver may recover money paid to investors in excess of the amounts of their original investments or for which proper consideration was not paid. *Id.* at 710. The court in *Merrill* went further to hold that, as a matter of law, no consideration exists for the transfer of purported profits under a "Ponzi" scheme. *Id.* at 859.

Clearly, the Receiver may recover proceeds of the Enforcement Action Defendants' fraud from the Long Investors - participants in the investment program who received payments exceeding the amount of their original investments.

V. The Movants are not entitled to attorney fees.

Generally, attorney fees are not awarded in this state without statutory authority or a specific contractual provision. *State v. JOA, Inc.*, 78 P.3d 534 (Okla. 2003). Under 12 O.S. § 941, a defendant in a civil action brought in any state court by any state agency may recover court costs, witness fees and reasonable attorney fees *if* the court determines that the action was frivolous or brought without reasonable basis.

The Department has brought a securities fraud case against Marsha Schubert and/or Schubert and Associates. The victims of the fraud would no doubt disagree that the Department's action was an unfounded or frivolous endeavor. Second, the Department did not bring an action against the Movants in Logan County. They have chosen to try to intervene in this matter, making it preposterous that the Department would be responsible for their costs and fees. In fact, the opposite is true. The ultimate recovery to all investors who have suffered net losses continues to be reduced as the Receivership assets have to be expended for the purpose of defending unreasonable claims such as the ones currently before this Court. Therefore, the Department respectfully requests that the Movants reimburse the Receiver for the fees and costs associated with his defense of this matter.

Conclusion

The Amended Order should not be vacated as requested by Movants. 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 by the Enforcement Action Defendants occurring in Logan County and the Department respectfully requests that there it shall remain.

Respectfully submitted,

OKLAHOMA DEPARTMENT OF SECURITIES
Irving L. Faught, Administrator

By:



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 11th day of August, 2005, a true and correct copy of the above and foregoing was mailed by U.S. Mail, with postage prepaid thereon, addressed to:

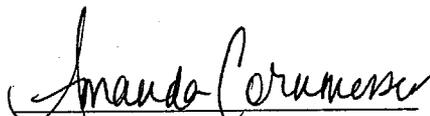
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Amanda Cornmesser

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

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.)

SECOND ORDER AMENDING AUTHORITY OF RECEIVER

This matter came on for hearing this ____ day of _____, 2005, 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.

EXHIBIT 1

On October 14, 2004, upon Plaintiff's 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 Amending Authority of Receiver entered on December 10, 2004, should be modified as provided herein, and, therefore, Douglas L. Jackson ("Receiver"), shall continue to serve as Receiver for the Defendants to, *inter alia*, collect the proceeds of the fraudulent scheme perpetrated by Marsha Schubert and Schubert and Associates, and marshal the assets of Defendants. For purposes of this section, "assets" shall mean those assets 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 (Investment Program)

IT IS FURTHER ORDERED that Douglas L. Jackson is hereby appointed as receiver for the creditors of Marsha Schubert and Schubert and Associates.

IT IS FURTHER ORDERED that the Receiver is authorized to accomplish the following:

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, including any actions against participants in the Investment Program who were unjustly enriched through the transfer of proceeds of the fraudulent scheme when such transfers were not supported by proper consideration (Long Investors); persons who did not invest any amount of money in the Investment Program,

yet received proceeds of the fraudulent scheme (Non-Investors); and brokerage firms and/or other third parties from whom the Receiver deems it necessary to seek disgorgement of the proceeds of the fraudulent scheme, in order to promote equity and a fair distribution among all deserving participants in the Investment Program, and all deserving creditors of Marsha Schubert and/or Schubert and Associates, upon notice and application to the Court; however, such authority shall in no way be intended to impair or impede a private right of any participant in the Investment Program, or any creditor of Marsha Schubert and/or Schubert and Associates, to seek rescission or other appropriate relief;

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 ____ day of _____, 2005, at ____:____, __.m.

DISTRICT COURT JUDGE

Approved as to Form and Substance:

Gerri L. Stuckey, OBA #16732
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