

FEB 26 2007

IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA

PATRICIA PRESLEY, COURT CLERK  
by \_\_\_\_\_  
Deputy

OKLAHOMA DEPARTMENT OF SECURITIES )  
*ex rel.* Irving L. Faught, Administrator, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
 )  
FARMERS & MERCHANTS BANK, et al. )  
 )  
Defendants. )

Case No. CJ-2006-3311  
Honorable Patricia G. Parrish

**DEFENDANTS' RESPONSE AND OBJECTION  
TO MOTION TO INTERVENE**

COME NOW Defendants Farmers & Merchants Bank, Farmers & Merchants Bancshares ("Bancshares"), John V. Anderson and John Tom Anderson (collectively referred to as "Defendants") and file this Response and Objection to the Motion to Intervene. In support hereof, Defendants state and allege as follows:

**INTRODUCTION**

On December 8, 2006, the proposed intervenors (referred to herein as the "intervenors"), filed a separate lawsuit against Defendants in Oklahoma County District Court, Case No. CJ-2006-10049 (the "first lawsuit"), making the identical claims contained in the Petition in Intervention. Since the intervenors reside in Kingfisher and Shawnee, respectively, and no part of the facts giving rise to the first lawsuit occurred in Oklahoma County, Defendants filed a Motion to Dismiss for, among other things, improper venue.

In an apparent acknowledgement that the first lawsuit was filed in the improper county, intervenors filed on January 11, 2007, a Motion to Intervene in this civil

enforcement action filed by the Oklahoma Department of Securities (“ODS”) on April 21, 2006. The Motion to Intervene attached a Petition in Intervention which suffers from the same legal infirmities addressed by Defendants in their Motion to Dismiss filed in the first lawsuit. To that extent, Defendants adopt and incorporate by reference the argument and authorities contained therein warranting dismissal of the Petition.

Clearly, intervenors wish to do anything – including having two (2) identical lawsuits filed at the same time – to avoid filing the lawsuit in the proper forum: Logan County. As explained herein, not only is such an attempt unsupported by Oklahoma law relating to intervention by right and/or permission, it is also unprecedented to permit private litigants to thrust themselves wholesale into a governmental enforcement action and thereby commingle the distinct public and private interests at stake. Oklahoma law does not permit such a disruption, which would only delay and prejudice the rights of Defendants in this matter.

### **ARGUMENT AND AUTHORITIES**

#### **I. THE INTERVENORS DO NOT HAVE A RIGHT TO INTERVENE UNDER 12 O.S. § 2024(A)(2).**

Intervention by right<sup>1</sup> is governed by 12 O.S. § 2024(A). It provides, in pertinent part, that:

- A. INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action:
  - 1. When a statute confers an unconditional right to intervene; or
  - 2. When the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest.

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<sup>1</sup> Intervention by right is also referred to by courts as “mandatory intervention.”

Intervenors do not claim in this case, nor could they, that any statute confers to them an unconditional right of intervention. Thus, whether intervenors have the right to intervene is exclusively controlled by 12 O.S. § 2024(A)(2) and the case law interpreting it. Intervenors' argument for mandatory intervention can be easily disposed of as detailed herein.

**A. Intervenors Have Failed To Identify Their Protectable Interest**

The first step in the analysis under § 2024(A)(2) is the meaning to be given the term "interest" as it is used in the statute. In this case, intervenors have not addressed, either directly or indirectly, the question of what constitutes an "interest" necessary to intervene as a matter of right. In *Donaldson v. United States*, 400 U.S. 517, 91 S.Ct. 534, 542 (1970), the United States Supreme Court stated the proposed intervenor's interest must be "significantly protectable." The proposed intervenors in this case have failed at their first task of describing or even explaining their significantly protectable interest in this case.

**B. Intervenors' Interest Does Not Relate To Real/Personal Property**

The reason intervenors have not addressed the question of what constitutes an "interest" necessary to intervene as of right is that the answer clearly works against them. That is, this case is not about the proposed intervenors' interest in specific real or personal property. It can only be presumed from reading their motion that intervenors are claiming an interest in the civil enforcement action brought by the Oklahoma Department of Securities against Defendants. See ¶ 1 to intervenors' motion. However, for intervention to be mandatory, the intervenor's purported interest must relate to specific real or personal property. *Gettler v. Cities Service Company*, 1987 OK 57, 739 P.2d 515,

518. Since the intervenors' interest does not relate to property, there is no right to intervene in this lawsuit.

C. **A Suit For Damages Does Not Support Intervention Of Right**

A second fundamental reason to reject the intervenors request to intervene of right relates to their requested relief. Under Oklahoma law, intervention is not "of right" where the proposed intervenor is suing for damages. As previously indicated, intervention is mandatory "where the intervenor claims an interest relating to the property or transaction which is the subject of the action and the disposition of the action may impair or impede his ability to protect that interest." *Nicholas v. Morgan*, 2002 OK 88, ¶ 20, 58 P.3d 775, 782 (citing 12 O.S. § 2024 and *Tulsa Rock Co. v. Williams*, 1982 OK 10, ¶ 5, 630 P.2d 530, 532.<sup>2</sup> In *Gettler v. Cities Service Company*, 1987 OK 57, 739 P.2d 515, 518 – the case *relied* upon by intervenors for intervening as a matter of right – the Oklahoma Supreme Court stated that "actions for money damages do no qualify for mandatory intervention." Permissive joinder solely applies when an intervenor is claiming money damages. *Id.*

The reason is straightforward: when an intervenor's claimed interest relates to a right to sue for damages, rather than an interest in specific property/transaction, the intervenor may simply maintain a separate action without impairment. *See Deen v. Fruehauf Corporation*, 1977 OK 27, 562 P.2d 505, 507. The intervenor's interest can be preserved, established, or enforced in ways other than by determination and action by the court in the underlying action. *Tulsa Rock Company v. Williams*, 1982 OK 10, 640 P.2d

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<sup>2</sup> The Oklahoma Supreme Court and Court of Civil Appeals have cited to pre-Code cases when construing 12 O.S. § 2024, suggesting little difference between prior Oklahoma practice or the rules in other jurisdictions. *See In the Matter of the Adoption by D.D.B.*, 1988 OK 4, 749 P.2d 542, 544-545 (a case cited by intervenors in their motion); *Grand River Dam Authority v. Brogna*, 1991 OK CIV APP 104, 827 P.2d 901, 902.

530, 532. In this case, intervenors are claiming damages against Defendants due to their alleged material participation in Marsha Schubert's unlawful sale of securities. See ¶¶ 108 and 110 to intervenors' Petition in Intervention. For this reason, *Gettler* is dispositive of intervenors' claim for intervening as a matter of right and intervenors' motion should be rejected.

**D. Intervenors' Claimed Interest Will Not Be Impaired**

Even if *Gettler* was not dispositive, it is the intervenor's burden to "demonstrate that the disposition of this action may as a practical matter impair or impede their ability to protect their interest." *Utah Association of Counties v. Clinton*, 255 F.3d 1246, 1253 (10<sup>th</sup> Cir. 2001). It strains credulity for intervenors to suggest to this Court that intervention is mandatory since their interests may be impaired or impeded by reason of the ODS action when *intervenors originally filed suit separately and independently from the ODS case*, and only tried to intervene in this case once a motion to dismiss for improper venue was asserted against them. While intervenors speculate, with no analysis or legal support, that the ODS lawsuit may impact their ability to independently sue,<sup>3</sup> case law from other jurisdictions spurn such a claim.

**1. The Colorado Supreme Court has rejected a similar claim**

For instance, the Colorado Supreme Court has previously rejected the identical argument being made by intervenors in this case. See *Feigin v. Alexa Group, Ltd.*, 19 P.3d 23 (Colo. 2001). Intervenors, have failed to alert this Court to the *Feigin* opinion because it is directly adverse to the position being asserted by them.

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<sup>3</sup> Intervenors state in vague and conclusory fashion that they "face the possibility that *stare decisis, res judicata* or collateral estoppel may subsequently prevent them from seeking redress against Defendants if they are not made a party to this action." See Intervenors' Motion at p. 5. However, intervenors cite no case law and fail to provide any legal analysis to support such a claim.

In *Feigin*, investors sought to intervene in the Colorado State Securities Commissioner's civil enforcement action against a broker-dealer who was operating a "Ponzi" scheme. The State Securities Commissioner filed a civil enforcement action in state district court seeking an injunction and damages for the defrauded investors. The investors sought to intervene as of right in the civil action in order to contest the settlement reached by the Commissioner. With respect to the issue of whether the investors' rights would be impaired by the Commissioner's action, the Colorado Supreme Court sided with other jurisdictions that "held that where there were alternative forums in which to bring a suit, an intervenor is neither impaired nor impeded in his ability to protect his interests under Rule 24(a)(2)." *Id.* at 30. In this case, intervenors simply wish to avoid suing in the alternative and proper forum: Logan County, Oklahoma. Inconvenience has never been the legal standard by which intervention by right has been determined and it should not start now.

## **2. The Logan County lawsuit's claims procedure**

There is an additional reason why intervenors cannot establish that their rights would be impaired or impeded if they were unable to intervene in this lawsuit, separate and distinct from suing Defendants for damages in another forum. As this Court is well aware, ODS instituted a lawsuit against Marsha Schubert in Logan County (not Oklahoma County) for violating Oklahoma's securities statutes. Schubert is the individual with whom Defendants in this case are alleged to have "materially participated with" in illegally selling securities, thereby giving rise to purported joint and several liability under Oklahoma law. Judge Worthington, who presides over ODS's case against Schubert in Logan County, appointed a receiver, Douglas L. Jackson, for Marsha

Schubert, Schubert & Associates, and for the benefit of claimants and creditors of Schubert, including the intervenors in this case. *See Second Order Amending Authority of Receiver*, attached hereto as Exhibit 1.

The Receiver was empowered by the District Court with the authority to marshal, protect, and preserve all assets of Schubert and to institute any action against participants in Schubert's Ponzi scheme who were unjustly enriched. *Id.* Each of the proposed intervenors in this case authorized the Receiver to personally represent them and assert their rights in the lawsuits against those who received fictitious profits from Schubert's Ponzi scheme. *See Affidavits*, attached hereto as Exhibit 2.

As part and parcel of his court-ordained powers, the Receiver also established a claims procedure – approved by the Court – for making claims with the Schubert Receivership Estate. *See Order Granting Application of Receiver for Approval of Process for Allowance and Rejection of Claims*, attached hereto as Exhibit 3. As explained therein, the Receiver has collected sufficient funds to make a *partial*, or a non-final, distribution to the claimants and/or creditors whose claims are allowed in full or in part. The partial or non-final distribution amounts to approximately \$1 million and future distributions are anticipated. The intervenors in this case have all filed claims with the Receiver.

Such a claims procedure established by the Receiver has been found legally sufficient to deny a motion to intervene as of right. *See Commodity Future Trading Commission v. Chilcott Portfolio Management*, 724 F.2d 584 (10<sup>th</sup> Cir. 1984). In the *Chilcott* case, the Commodity Future Trading Commission filed suit against an individual who fraudulently sold commodity futures contracts. As part of the Commodity's action,

the court appointed a receiver over the defendant's assets. The receiver set up a claims procedure for defrauded investors, "with the intent to eventually distribute any assets to the defendant's creditors and investors." *Id.* at 586. Barber, a defrauded investor, sought to intervene in the government's action.

The Tenth Circuit upheld the district court's conclusion that Barber was not being foreclosed from presenting his claim and that the claims procedure provided for adequate protection of Barber's claim. The Court stated that:

. . . the district court was of the view that in denying Barber's motion to intervene and to sue the receiver, Barber was not being foreclosed from asserting his claim . . . ***The district court believed such was preferable to having Barber, and possibly numerous other persons, intervene and become full-fledged parties to the litigation started by the government.*** In thus holding, the district court did not err.

*Id.* (emphasis added)(citing *Securities and Exchange Commission v. Everest Management Corporation*, 475 F.2d 1236 (2d. Cir. 1972)).

The court was unimpressed with the argument that the claims procedure was inadequate to protect Barber's interests, and specifically found that the "claims procedures set up by the Receiver will permit Barber to protect his claimed interest in the assets presently under the control of the Receiver." *Id.* at 587. Therefore, the petitioner's motion to intervene in the Commission's lawsuit was properly denied. *See also Securities and Exchange Commission v. Kings Real Estate Investment Trust*, 222 F.R.D. 660, 668 (2004)(individual investor defrauded by seller of securities could not intervene in SEC's civil enforcement action against the seller since the "claims procedure established by the Receiver would provide [intervenor] sufficient protection" to obtain money invested with seller).

The above cited cases firmly reject any argument that intervention must be allowed or the intervenor's rights will be impaired. Such an allegation simply is not supported by the law. In addition to previously recovering substantial damages from Schubert's employer (AXA Advisors) for its direct role in Schubert's Ponzi scheme, intervenors have filed claims with the Receiver appointed in the Logan County case. A claims procedure has been established and the Receiver has petitioned the Court to allow a partial distribution of the moneys collected to this point in time. The Receiver's proposed partial distribution plan also permits an investor with the opportunity to object to the proposed distribution. Such a claims procedure negates any argument that intervention must be allowed in this civil enforcement action begun by the Oklahoma Department of Securities.

## **II. INTERVENORS SHOULD NOT BE PERMITTED TO INTERVENE UNDER 12 O.S. § 2024(B)(2).**

Intervenors' claim for permissive intervention must also be denied. 12 O.S. § 2024 (B) provides as follows:

PERMISSIVE INTERVENTION. Upon timely application anyone may be permitted to intervene in an action:

1. When a statute confers a conditional right to intervene, or
2. When an applicant's claim or defense and the main action have a question of law or fact in common.

*. . . In exercising its discretion<sup>4</sup> the court shall consider whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties.*

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<sup>4</sup> Discretion in a legal sense is a "discretion to be exercised in discerning the course prescribed by law, according to principles ascertained by adjudicated cases." *First Nat. Bank of Seminole v. Henshaw*, 1934 OK 410, 35 P.2d 898, 903.

(emphasis added). In this case, the Court should deny intervenors' request for permissive intervention since it would not only prejudice the rights of Defendants to have intervenors' lawsuit filed in the proper county, but it would also unduly delay the litigation of this case.

A. **Permitting Intervention Would Trample Defendants' Rights**

As previously demonstrated to this Court in Defendants' Motion to Dismiss filed in the intervenors' first lawsuit, venue is not proper in Oklahoma County. Defendants hereby adopt and incorporate the authorities and arguments raised in the Motion to Dismiss. Thus, in a transparent attempt to manufacture venue, intervenors are attempting to do through intervention what they are strictly prohibited from doing through an original suit. It would be highly prejudicial and incongruous for the Court to grant Defendants' Motion to Dismiss for improper venue, yet allow intervenors to thwart the purposes and privileges served by the venue statutes by permitting them to intervene in ODS's lawsuit.

Oklahoma's venue statutes expressly fix the venue of every type of action. *See Hiner v. Hugh Breeding, Inc.*, 1960 OK 194, 355 P.2d 549. The Oklahoma Supreme Court has repeatedly held as inviolate the "***substantial and valuable right***" of being sued in the proper county. In *Hiner*, the Court stated:

We have pointed out in numerous cases the privilege extended a defendant to be sued in the county of domicile is a substantial and valuable right which is not to be denied upon a strained or doubtful construction.

*Id.* at 551. Therefore, Defendants' recognized rights relating to proper venue would be prejudiced if intervenors are allowed to thrust themselves into this lawsuit in an improper county. Oklahoma law does not prescribe such a result.<sup>5</sup>

**B. Intervention Would Unduly Delay This Civil Enforcement Lawsuit**

Intervention by permission should also be denied because it will unduly delay the underlying litigation, without significantly contributing to the full development of the underlying factual issues in the suit. *See New Orleans Public Service, Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452 (5<sup>th</sup> Cir. 1984). Permitting intervention will only create the specter of opening a floodgate to hundreds of similarly situated investors seeking to intervene in a civil enforcement action brought by ODS, producing a multifariousness of parties and a protracted litigation process. *See Chilcott*, 725 F.2d at 586; *see also Precision Pipe & Supply, Inc. v. Meram Construction, Inc.*, 489 N.W.2d 166 (Mich.App. 1992)(“intervention may not be proper where it will have the effect of delaying the action or producing a multifariousness of parties and causes of action”).

As a final point, it bears mentioning that permitting intervention is also inconsonant with the recognized distinction between the enforcement of public and private rights. This civil enforcement action was brought by the Oklahoma Department of Securities in a purported attempt to vindicate public rights and to enforce compliance with Oklahoma's securities statutes. Intervenors are private litigants seeking to recover their alleged damages, which includes an additional claim for punitive damages. Permitting intervenors to involve themselves in a governmental enforcement action is unprecedented and contrary to law. As one court stated under similar circumstances:

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<sup>5</sup> Federal commentators have noted that “permissive intervention should not be allowed if venue would be improper for the action with the intervenor as a party.” 7C FPP § 1918; *see also Finck v. Gilman Bros. Co.*, 11 F.R.D. 198 (D. Conn. 1951)(intervention improper where venue would be improper).

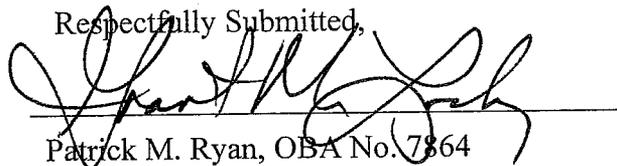
We adhere to our prior rulings . . . to the effect that public and private rights of action are separate and distinct, and not to be mingled in one proceeding. To do otherwise would hopelessly disrupt orderly proceedings in this type of action and . . . the timing and scope of enforcement would become subject to the vagaries of private litigation . . . Any wholesale commingling of discrete administrative and judicial responsibilities in public and private actions likely would hinder, disrupt, and render torpid the statutory scheme for expedited enforcement.

*U.S. v. Exxon*, 773 F.2d 1240, 1283 (Temp.Emer.Ct.App. 1985)(internal quotations and citation omitted). For these same reasons, the Court should reject intervenors' attempt to thrust themselves into a government enforcement action, thereby impairing and delaying the litigation in violation of 12 O.S. § 2024(B)(2).

### CONCLUSION

For the reasons stated above, the Court should deny the proposed intervenors' Motion to Intervene and grant Defendants all other relief to which they might be entitled.

Respectfully Submitted,



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**CERTIFICATE OF SERVICE**

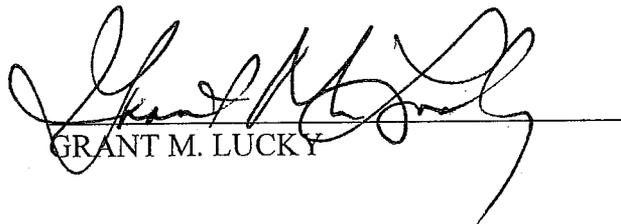
I hereby certify that on this 26<sup>th</sup> day of February, 2007, a true and correct copy of the above and foregoing instrument was mailed, via U.S. First Class Mail, postage prepaid, to the following counsel of record:

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