

IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT  
OKLAHOMA COUNTY, OKLA.

DEC - 3 2009

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

Oklahoma Department of Securities )  
*ex rel.* Irving L. Faught, )  
Administrator, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
The Estate of Bryan David Roark, )  
 )  
Defendant. )

Case No. CJ 2009-10905

**PLAINTIFF'S RESPONSE TO EMERGENCY APPLICATION  
FOR ORDER REGARDING DISBURSEMENT OF NECESSARY EXPENSES  
AND REASONABLE ATTORNEY'S FEES FOR  
INTERVENOR WITH COURT APPROVAL**

Plaintiff, the Oklahoma Department of Securities *ex rel.* Irving L. Faught, Administrator (Plaintiff), respectfully objects to the *Emergency Application for Order Regarding Disbursement of Necessary Expenses and Reasonable Attorney's Fees for Intervenor With Court Approval* (Application) for the following reasons:

1. On November 4, 2009, Plaintiff filed a *Petition for Restitution and/or Other Equitable Relief* (Petition) and an *Emergency Application for Order Freezing Assets and Order Appointing Receiver*, pursuant to Section 1-603 of the Oklahoma Uniform Securities Act of 2004 (Act), Okla. Stat. tit. 71, §§ 1-102 through 1-701 (Supp. 2003). This Court issued an *Order Freezing Assets and Order Appointing Receiver* (Freeze Order) on the same day.

2. On November 13, 2009, an *Agreed Order Authorizing Conditional Intervention by Christiana K. Roark* was entered by this Court (Conditional Order). The Conditional Order provides in part as follows:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that C. Roark will be allowed to intervene in this matter but only with respect to any issues relating to any real property which C. Roark held in joint tenancy with Bryan Roark and/or any other asset for which she is an owner of record.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all litigation shall be stayed with respect to any other marital assets until such time as the Plaintiff and/or the Receiver completes an analysis of the bank records relating to the activities that are the subject of this matter.

3. On November 24, 2009, an *Agreed Order Authorizing Conditional Intervention by Chad Roark and Craig Roark* was entered by this Court.

4. The court-appointed Receiver, Doug Jackson, has begun the process of liquidating assets in accordance with the Freeze Order.

5. Plaintiff is analyzing the bank accounts controlled by Bryan Roark. One account is a bank account styled as an account of Morgan Stanley opened by Bryan Roark without authorization from Morgan Stanley. Roark had sole control over the account. Plaintiff's analysis to date shows that deposits of investor funds, totaling approximately \$14,500,000, were made into this account. As of the date of the Freeze Order, the Morgan Stanley account had a balance of \$188,678.72.

6. Plaintiff's initial analysis shows that investor funds deposited into the Morgan Stanley bank account were transferred to other accounts controlled by Bryan Roark including, but not limited to, joint checking accounts with Christiana Roark (Intervenor C. Roark).

7. For an interim period, the Receiver has agreed to pay the housing expenses relating to the homes of Intervenor C. Roark and Craig Roark, to include utilities, insurance, repairs, and taxes. In addition, the Receiver has agreed to pay the insurance premiums on the vehicles driven by Intervenor C. Roark, Craig Roark, Chad Roark, and the girlfriend of Craig Roark. The housing and vehicle insurance payments are estimated by the attorney for Intervenor C. Roark to be approximately \$1,616 per month.

8. On December 2, 2009, Intervenor filed the Application seeking a monthly disbursement from assets of the receivership (Receivership Assets) of \$4,614.02 to supplement her monthly salary. She also requests a one time disbursement of \$14,602.59. These requests include the expenses of her two adult children.

9. The children of Intervenor C. Roark are ages 22 and 24 and are on full athletic scholarships to East Central University in Ada, Oklahoma:

10. Intervenor C. Roark has also requested an upfront payment of \$4,500 for back surgery for Chad Roark. The attorney for Intervenor C. Roark has represented to Plaintiff that the surgery is an elective surgery relating to an injury sustained while Chad Roark was in high school.

11. The attorney for Intervenor C. Roark has represented to Plaintiff that the \$828.55 for an emergency room visit will most likely be paid by an insurance policy covering Intervenor C. Roark.

### **ARGUMENT**

Plaintiff does not object to the payment of a monthly allowance from Receivership Assets to Intervenor C. Roark pending its analysis of the relevant bank

records. However, Plaintiff believes such allowance must be reasonable in amount and purpose, particularly in light of the millions of dollars of investor funds that are unaccounted for in this case.

The Plaintiff objects to a monthly disbursement of \$4,614.02 from Receivership Assets as being unreasonable under the circumstances. Intervenor C. Roark receives a monthly salary that is not subject to the Court's asset freeze and, in the interim, the Receiver is paying the household expenses for Intervenor C. Roark and her adult children.

An asset freeze is put in place to protect investors and the regulatory agency's ability to seek disgorgement of illegally obtained funds. *See SEC v. Unifund SAL*, 910 F.2d 1028, 1041 (2d Cir. 1990). An asset freeze preserves a defendant's assets so that the assets are available to victimized investors of the securities fraud. *SEC v. Dobbins*, 2004 WL 957715, \*2 (N.D. Tex. April 14, 2004). A freeze order was essential in this case, which involves approximately 80 investors who bear potential losses of millions of dollars.

The wrongdoer in this case, Bryan Roark, is deceased. A significant portion of the Receivership Assets are believed to have been paid for by Bryan Roark with investor funds. The assets must be preserved to the greatest extent possible until a determination can be made as to whether the value of the frozen assets exceeds the potential disgorgement amount due the victims of Bryan Roark's fraudulent scheme.

#### **One Time Expenses**

With respect to the payment for her emergency room visit, counsel for Intervenor C. Roark has represented to Plaintiff that the \$828.55 charge will most likely be paid by

an insurance policy covering Intervenor C. Roark. If the insurance company does not make such payment, this issue may be brought before the Court for consideration at that time. Plaintiff also contends that payment of the wrongdoer's funeral expenses from Receivership Assets is not warranted. *See SEC v. Grossman*, 887 F. Supp. 649 (S.D.N.Y. 1995). The *Grossman* court considered a requested modification of an asset freeze to permit the payment of attorneys' fees and funeral and burial expenses. The court stated that the defendant "must establish that such a modification is in the interest of the defrauded investors." *Id.* at 661. The court concluded that there was no ground for modifying the asset freeze because the expenses were unrelated to the interest of investors. *Id.* Likewise, the one time payments from Receivership Assets requested by Intervenor C. Roark are unrelated and, therefore, not in the interest of the defrauded investors, especially if the Receivership Assets are not sufficient in value to cover restitution to the investors.

#### **Legal Fees**

Similarly, in considering requests by defendants to use frozen funds for attorneys' fees, courts properly place investor's interests over those of defendants. *SEC v. Forte*, 598 F. Supp. 2d 689, 692 (E.D. Pa. 2009); *Grossman* at 661. The release of funds for legal fees must be in the best interest of the victims. *Id.* In satisfaction of this requirement, the defendant should establish that the frozen assets exceed possible disgorgement before the release of any funds. *SEC v. Bremont*, 954 F. Supp. 726, 733 (S.D.N.Y. 1997) ("until such time as the Court can determine whether the frozen assets exceed the SEC's request for damages, defendants will not be permitted to use any of the

frozen assets”). As the Seventh Circuit noted in *SEC v. Quinn*, 997 F.2d 287, 288 (7<sup>th</sup> Cir. 1993):

Parties to litigation usually may spend their resources as they please to retain counsel. “Their” resources is a vital qualifier. Just as a bank robber cannot use the loot to wage the best defense money can buy, so a swindler in securities markets cannot use the victims’ assets to hire counsel who will help him retain the gleanings of a crime.

Intervenor C. Roark is not a defendant in this case and does not have to mount any type of legal defense. Any future legal expenses that she may incur in this matter are limited in scope and nature to her rights to any of the Receivership Assets. Intervenor C. Roark’s interest in this matter is *diametrically opposed* to the interests of the defrauded investors. As stated by the court in *Grossman*, “it is well-established that there is no right to use the money of others for legal services.” *Id.* at 661. Payment of Intervenor C. Roark’s legal fees from Receivership Assets should not be authorized by the Court.

Plaintiff acknowledges that payment of the intervenor’s attorney fees is within the Court’s discretion. In *SEC v. Capital Counselors, Inc.*, 512 F. 2d 654 (2<sup>nd</sup> Cir. 1975), an application for the allowance of a claim against a securities receivership estate for legal services was filed. The court stated that “the award of attorneys’ fees in a case such as this is entrusted to the sound discretion of the district judge.” *Id.* at 658. If this Court does allow for payment of attorney fees to Intervenor C. Roark, Plaintiff requests that the amount allowed be capped at a reasonable amount. Plaintiff further requests that counsel for Intervenor C. Roark present a detailed invoice for his legal services for consideration and approval by the Court before payment is made from Receivership Assets.

### **Expenses of Dependent Children**

Intervenor C. Roark is requesting that her monthly allowance include estimated expenses for food, gas, school supplies, and cellular telephone service for her adult children. Intervenor C. Roark relies, in part, on 36 O.S. §4101.1(A) in support of her request for her adult children. This statute defines “dependents” for purposes of group life insurance policies only and has no applicability to the matter at hand.

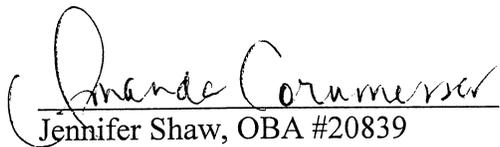
The intervenor’s adult children are both over the age of 21 and attend East Central University on full scholarships. Consequently, Plaintiff objects to a monthly allowance to Intervenor C. Roark to cover the gas, vehicle maintenance, food, school supplies, and cellular telephone expenses for her adult children. It is not in the public interest or in the interest of the victims in this case, for such expenses to be paid from Receivership Assets. Plaintiff also objects to a disbursement from Receivership Assets for an elective surgery that, by definition, is not necessary at this time, or for unexplained medical expenses for services provided by the Oklahoma Spine Hospital. These expenses should not be paid from Receivership Assets.

### **CONCLUSION**

In light of the facts presented and the authorities cited, Plaintiff respectfully requests that this Court deny the Application of the Intervenor. Instead, the Plaintiff respectfully requests that this Court make a determination of a reasonable monthly distribution to Intervenor C. Roark for the months of December 2009, and January and February 2010. Should the analysis of Bryan Roark’s activities not be complete by the end of February, Intervenor C. Roark may apply to the Court for additional distributions.

Should the Court allow the payment of attorney fees from the Receivership Assets, Plaintiff requests that there be a cap on such fees. In addition, Plaintiff requests that counsel for Intervenor make application to the Court for approval of such fees based on a detailed invoice. At that time all parties to the action may have an opportunity to review the fees and make an objection, if warranted.

Respectfully submitted,

  
Jennifer Shaw, OBA #20839

Amanda Cornmesser, OBA # 20044  
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ATTORNEYS FOR PLAINTIFF

**CERTIFICATE OF SERVICE**

I hereby certify that on the 3rd day of December 2009, a true and correct copy of the above and foregoing response, was mailed to:

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